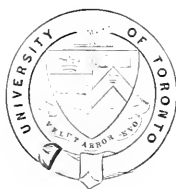
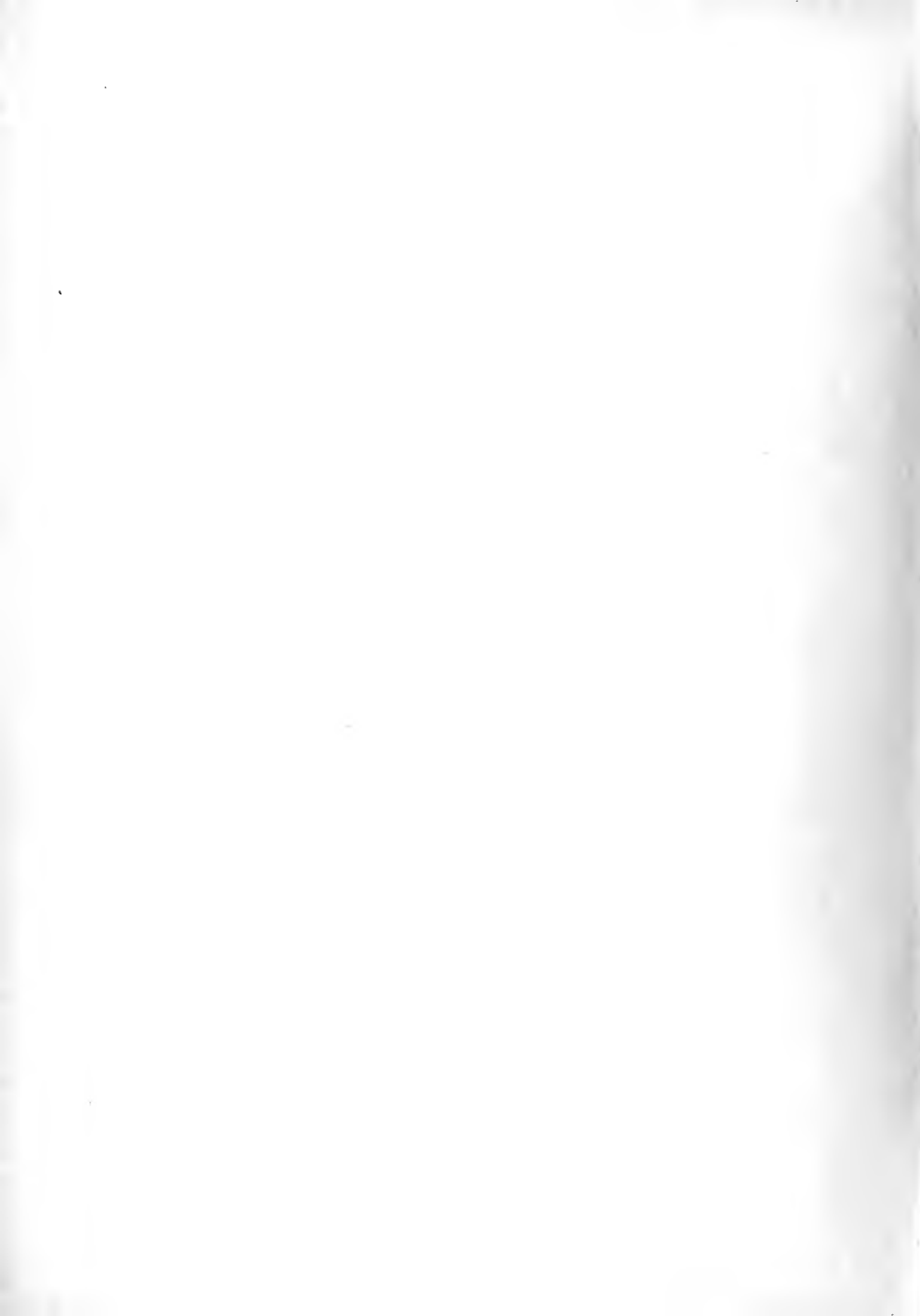


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THE LIVES OF THE
CHIEF JUSTICES OF ENGLAND



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THE LIVES
OF
THE CHIEF JUSTICES
OF
ENGLAND.



SIR GEORGE JEFFREYS
1693-1731
CHIEF JUSTICE OF ENGLAND

Law
Eng
C188k.2

THE LIVES
OF
THE CHIEF JUSTICES
OF
ENGLAND.

FROM THE NORMAN CONQUEST TILL THE DEATH
OF LORD TENTERDEN.

BY
JOHN, LORD CAMPBELL,
Lord Chief Justice and Lord High Chancellor of England.

New and Revised Edition.
WITH ILLUSTRATIONS AND NUMEROUS ANNOTATIONS.
EDITED BY JAMES COCKCROFT.

VOL. III.

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LIVES

OF THE

CHIEF JUSTICES OF ENGLAND.

CHAPTER XX.

LIFE OF LORD CHIEF JUSTICE PEMBERTON.

THE career of our next Chief Justice is more checked by extraordinary vicissitudes than that of any other legal dignitary mentioned in the annals of Westminster Hall. While yet a youth, he had wasted his substance by riotous living, and incurred enormous debts. Without education, without character, without friends, a slave to the worst propensities and habits, he was deprived of his liberty and became the associate of the most profligate of mankind. As the law then stood, there were no means of ever obtaining his liberation without satisfying the demands of his creditors, and there seemed a certainty that he must sink deeper and deeper in misery and in depravity till he expired in his cell. But a prison served him for a school, for a university, and for an inn of court. Here he became an elegant scholar, a profound lawyer, and qualified to run the race of honorable rivalry with those who had taken full advantage of regular tuition and training. By his own exertions, while

CHAP.
XX.
Glance at
the career
of Sir
Francis
Pemberton.

CHAP.
XX.

still a prisoner, he not only maintained himself creditably, but made an arrangement for the discharge of all his pecuniary engagements. Starting at the bar, though he was at first taunted as a "jail-bird," he was soon run after as a distinguished advocate; and he attained the highest honors of his profession. When he was placed on the bench and it might have been thought that his adventures were at an end, the remarkable strokes of adverse and auspicious fortune to which he was destined were only beginning. Thrice was he removed from high judicial situations, which he filled with credit, by the rude hand of arbitrary power. Again and again he recommenced pleading causes for clients in the courts in which he had presided. After trying Lord Russell, he was counsel for the Seven Bishops.¹ The Revolution brought him no repose. Having been punished, by Charles II. and James II., for imputed judicial independence, and supposed leaning to liberal principles, he was sent to Newgate by the Convention Parliament on the charge of favoring despotism and violating the privileges of the House of Commons. His character, likewise, from its varied and delicate lights and shadows, presents an interesting subject for contemplation. We become a little tired of Hale, from his uniform goodness; and we are sure that, on every occasion, Scroggs will show himself sordid and cruel. There being no struggle in the mind of either of them, we may at last regard the one with apathy, and the other with un-

Glance at
his character.

1. The Seven Bishops were Archbishop Sancroft of Canterbury, Bishops Ken of Bath and Wells, White of Peterborough, Lloyd of St. Asaph, Trelawney of Bristol, Lake of Chichester, and Turner of Ely. They drew up at Lambeth a petition against James II.'s requiring the clergy to read his Declaration of Indulgence during divine service in their churches (May, 1687). Arrested, and accused of publishing a seditious libel, they were tried before venal judges and a packed jury. But on June 30 they were acquitted in the midst of great popular rejoicings.—*Low and Pulling's Dict. of Eng. Hist.*



A JUDGE, TIME OF CHARLES II.

AFTER W. HOLLAR.



mixed disgust. Pemberton, when he entered public life, felt a passion for preferment, by which he was sometimes led to do what was wrong. But he had a conscience: when he transgressed the line of rectitude he was visited by remorse; and, though he yielded to compliances which he condemned, yet, rather than recklessly follow the example of some unscrupulous judges who were his contemporaries, he was willing to sacrifice the objects which were dearest to his heart. Thus he might have been addressed:

CHAP.
XX.

. . . "Thou wouldst be great;
Art not without ambition; but without
The illness should attend it. What thou wouldst highly,
That wouldst thou holily; wouldst not play false,
And yet wouldst wrongly win."¹

He was descended from the Pembertons of Pemberton in the county of Lancaster. His father, who was of a junior branch of that family, had been a merchant in London, and had died while still a young man, leaving a considerable fortune to be divided among five infant children. These were all carried off by the smallpox except Francis, in whom, therefore, the whole property centred. It would have been well for him if his mother had died at the same time; for she was a silly woman, and spoiled him by excessive indulgence. After her husband's death, she took a house in the town of St. Albans, where she had some relations; and young Frank was put to school there. His parts were very lively, and he could learn much in a little time; but he was sickly, and, under pretence of nursing him, she kept him almost constantly idle at home. At fifteen he could read and write pretty well, and had picked up a little smattering of Greek and Latin. He was then sent to Emmanuel College, Cambridge,² and there he remained above four years: but,

His origin
and educa-
tion.

A.D. 1640.

At Cam-
bridge.

1. *Macbeth*, Act i. sc. 5.

2. Admitted 12th August, 1640.

CHAP. XX. although he contrived to take the degree of B.A., it was remarked by his tutor, Dr. Benjamin Whitchcote, that, "notwithstanding all the pains taken upon him, from his giddiness, and the difficulty of fixing his attention, when he left Cambridge he had little more knowledge of books than he brought with him from St. Albans."

He is entered at the Temple.

To finish his education it was resolved to send him to an Inn of Court; and on the 14th of October, 1645, he was admitted a member of the Honorable Society of the Inner Temple.¹ There was no expectation of his following the law as a profession; but, the civil war being extinguished, young men of family and fortune again attended "Readings" and "Moots," that they might acquire enough of law to qualify them to manage their estates and to act as Justices of the Quorum.

His profligate mode of life.

While at Cambridge, although Pemberton had been idle and listless, his morals had remained uncontaminated; but he now made the acquaintance of a set of young men who initiated him in all sorts of debauchery. Several of them had, for a short time, carried arms for the King, and thought that they could still safely show their hatred of the Roundheads by outvying the licentiousness which had distinguished the Cavaliers when they were serving in the field. The following year Pemberton was of age, and, according to his father's will, he came into possession of his fortune. This was speedily known to his dissolute companions, some of whom were in great pecuniary difficulties and driven to live upon their wits. Besides taverns, theatres, and other such places of dissipation, they carried him to gaming-houses, engaged him in deep play, and, in the course of eighteen months,

A.D. 1646.

He wastes his patrimony.

A.D. 1647.

1. He is described as son of Radulph Pemberton, of St. Albans in the county of Herts, Esq.

stript him of every Carolus he had in the world. More than this, they not only led him to contract large debts for clothes, wine, horses, etc., for his own use, but to become surety for them to tradesmen and money-changers. In consequence, his mortgaged lands were foreclosed or taken under *elegits*;¹ judgments being entered upon the bonds and statutes which he gave to his creditors, all his movables were swept away under *fi. fas.*; and at length a relentless Jew, who had lately returned into England, from which the race had been banished since the time of Edward I., sued out a *ca. sa.* against him for a large sum of money borrowed to pay a gaming debt, and shut him up in the Fleet.

CHAP.
XX.

He is con-
fined for
debt in the
Fleet.
A.D. 1647—
1652.

He had not been sober for many weeks, and it was some time before he could fully understand where he was and what had befallen him. Amidst the squalor which surrounded him, he was surprised to find loud revelry going forward, and he recognized faces that he had seen in the haunts of vice which he had been in the habit of frequenting. He was obliged to pay the *garnish* which they demanded of him; but he resolutely refused to join in their orgies. He awoke, as it were, from a dream, and was at first almost entirely overpowered by the horrors of his situation. He used afterwards to relate "that some supernatural influence seemed to open his eyes, to support him, and to make a new man of him." He contrived to get a small dis-
mal room for his own use without a chum, and in this he shut himself up. He tasted nothing but the bread and water which were the prison allowance; and his share of some charitable doles arising from fees on the last day of term, and other such sources, he gave away

His ref-
ormation.

1. A writ of execution by which a defendant's goods are appraised and delivered to the plaintiff, and, if not sufficient to satisfy the debt, one moiety of his lands are delivered, to be held till the debt is paid by the rents and profits.—*Webster's Dict.*

CHAP.
XX.

to others. What we have chiefly to admire is, that he nobly resolved to supply the defects of his education,—to qualify himself for his profession,—to pay his debts by industry and economy,—and to make himself respected and useful in the world. The resolution was formed in a hot fit of enthusiasm, but it was persevered in with cool courage, unflinching steadiness, and brilliant success. He was able to borrow books by the kindness of a friend of his father's who came to visit him. Bitterly regretting the opportunities of improvement which he had neglected at school and at college, he devoted a certain number of hours daily to the classics and to the best English writers—taking particular delight in Shakspeare's plays, although the acting of them had ceased, and they were not yet generally read. The rest of his time he devoted to the YEAR-BOOKS, to the more modern Reports, to the Abridgments, and to the compiling of a huge Commonplace Book for himself, which might have rivalled Brooke, Rolle, and Fitzherbert. His mode of life was observed with amazement and admiration by his fellow prisoners, who, knowing that he was a Templar, and that he was studying law night and day, concluded that he must be deeply skilled in his profession, and from time to time came to consult him in their own affairs,—particularly about their disputes with their creditors.¹ He really was of essential service to them in arranging their accounts, in examining the process under which they were detained, and in advising applications to the courts for relief. They, by and by, called him the "Councillor" and the "Apprentice of the Law,"² and such as could afford it insisted on giving him fees for

The credit-
able em-
ployment
of his time.

His legal
services to
his fellow
prisoners.

1. The Fleet was then by far the most populous civil prison, for it not only contained the debtors of the Court of Common Pleas, but all who were committed by the Court of Chancery.

2. This used to be the designation of barristers till they were made Sergeants.

his advice. With these he bought books which it was necessary that he should always have by him for reference. To add to his fund for this purpose, he copied and he drew law papers for the attorneys, receiving so much a folio for his performances. By these means he was even able to pay off some of the smallest and most troublesome of his creditors. Burnett, whose love of the marvellous sometimes betrays him into exaggeration, although his sincerity may generally be relied upon, says that Pemberton "lay *many years* in jail;"¹ but according to the best information I have been able to obtain, the period did not exceed five years. He obtained his discharge by entering into a very rational arrangement with his principal creditors. After pointing out to them the utter impossibility of their being ever satisfied while he remained in custody, he explained to them the profitable career which was before him if he could recover his liberty, and he assured them of his determined purpose to pay them all every farthing that he owed them the moment that it was in his power to do so. Accordingly the Jew, after stipulating for compound interest, and taking a fresh security, signed a warrant for entering satisfaction, and, all the detainers being withdrawn,

CHAP.
XX.

A.D. 1652.
He makes
an arrange-
ment with
his credit-
ors and is
discharged
out of
prison.

1. The passage is curious: "His rise was so particular, that it is worth the being remembered. In his youth, he mixed with such lewd company, that he quickly spent all he had, and ran so deep in debt, that he was cast into a jail, *where he lay many years*; but he followed his studies so close in the jail, that he became one of the ablest men of his profession."—*Owen Times*, ii. 144. Roger North, with much quaintness, adheres closer to the truth in his slight sketch of Pemberton: "This man's morals were very indifferent; for his beginnings were debauched, and his study and first practice in the jail. For having been one of the fiercest town rakes, and spent more than he had of his own, his case forced him upon that expedient for a lodging; and there he made so good use of his leisure, and busied himself with the cases of his fellow collegiates, whom he informed and advised so skillfully, that he was reputed the most notable fellow within those walls; and, at length, he came out a sharper at the law."—*Life of Guilford*, ii. 123.

CHAP. XX. Pemberton could again see the green fields and breathe the pure air of heaven.¹

He is welcomed at the Inner Temple Hall.

The creditable employment of his time in prison became well known in the Inner Temple Hall, and he was welcomed there very cordially. Imprisonment for debt was by no means so degrading then as we are apt to suppose. Even so late as the reign of George III. a great leader of the Western Circuit was often obliged to avail himself of his privilege to be free from arrest; and I myself have conversed with men who remembered an eminent conveyancer, and an eminent special pleader, both continuing in very extensive business while confined in the King's Bench prison. Pemberton's errors were regarded as more venial from the recollection of his extreme youth when his debts had been contracted, and of the manner in which he had been led astray by bad company.

He is called to the bar. Nov. 27, 1654.

Having kept the requisite number of terms, and done all his exercises, on the 27th of November, 1654, he was called to the bar.² Although inclined to monarchical principles, he did not scruple to take the oath "to be true to the Commonwealth," and he practised successively under the republican Chief Justices Rolle, Glyn, and Newdigate.

His success.

His rise into business was rapid. He first got into practice in the Palace Court at Westminster,—next in

1. At this time there were no "Rules of the Fleet," or district round the prison considered to be part of it; and all committed to it were kept *in salubra et arcta custodia*. This was not the first instance of legal studies going on within its walls. The famous treatise called *FLETA* was written by a lawyer confined in the Fleet in the reign of Edward I.

2. Books of Inner Temple—from which it appears that he was called to the bench on the 5th of February, 1671, and was elected Reader on the 21st of January, 1674. His arms are in the Inner Temple Hall, with the following inscription:

"Franciscus Pemberton A^r
Serviens ad legem. Elect.
Lect. Quadra A^o 1674."

I am indebted for this and much other valuable information to the kindness of Mr. Martin, the sub-treasurer of the Inner Temple.

the Court of King's Bench, and before he had been seven years at the bar he had discharged all his debts, including principal and compound interest for the Jew —whom he now regarded as his best benefactor.

CHAP.
XX.

Soon after the Restoration he became intimate with Sir Jeffrey Palmer, the Attorney General, and was employed as his "Devil" to prepare indictments and argue demurrers. In a few years he was succeeded in this office by North (afterwards Lord Keeper Guilford); but he still held briefs in all state prosecutions as counsel for the Crown. He was allowed to conduct the trial of the apprentices charged with high treason because they had pulled down some disorderly houses in Moorfields, the Attorney General himself being ashamed to appear in it. Pemberton contented himself with a brief statement of the facts, leaving to Lord Chief Justice Kelynge the odium and the ridicule of laying down the law.¹

He is appointed
"Devil" to
the Attorney
General.
A.D. 1668.

In Easter Term, 1675, he was called to the degree of Sergeant-at-law. From this time he seems to have been by far the most distinguished advocate practising at the English bar. He was leading counsel for the appellants in the famous appeals from the Court of Chancery to the House of Lords, in which members of the House of Commons were respondents.

He is made
a Sergeant.
A.D. 1675.

Now arose a dispute between the two Houses for the possession of his body, which had nearly ended in civil war. In spite of a resolution of the House of Commons that it would be a breach of their privileges for any lawyer to act in these appeals, Sergeant Pemberton, with becoming spirit, appeared at the bar of the House of Lords and argued stoutly for his clients. The Commons therefore voted that he had been guilty of a breach of their privileges, and ordered him to be taken into custody by the Sergeant-at-arms; but as

Contest
about him
between
the two
Houses of
Parliament.

1. 6 St. Tr. 879; *ante*, vol. ii. p. 269.

CHAP.
XX.
Contest
about him
between
the two
Houses of
Parlia-
ment,
continued.

soon as the order had been executed, the Lords passed a counter-resolution that it was a breach of their privileges to molest him for doing his duty under their sanction,—and ordered the officer of their house, the Usher of the Black Rod, to set him at liberty. It so happened, that the two champions met in the Court of Requests when the Sergeant-at-arms was conducting Pemberton to safer custody. The Usher of the Black Rod, with his attendants, gave the assault on the Sergeant-at-arms, who fled ignominiously, and Pemberton was the prize of the victors. The Commons, in a fury, passed a violent resolution against the pusillanimity of their officer, and ordered that the man who had defied their power should be immediately recaptured. Sergeant Pemberton, not aware of this proceeding, and thinking that the danger was over, returned next morning to the practice of his profession in the Court of Common Pleas; but Speaker Seymour, who had been deeply mortified by the abasement of the assembly over which he presided, as he walked up Westminster Hall to occupy the chair, spied Sergeant Pemberton wearing his coif and party-colored robes,—ran up to him, seized him, and, with the assistance of some messengers who were following in his train, lodged him in Little-Ease, the prison of the House of Commons,—from whence he was transferred to the Tower of London. The Lords next made an order on the Lieutenant of the Tower, requiring him to discharge the prisoner, and, when this was disobeyed, resorted to the novel expedient of issuing a writ of *habeas corpus* for bringing his body to their bar. The Commons, on the other hand, resolved “that no person committed by them for breach of privilege ought, by writ of *habeas corpus* or any other authority whatever, be made to appear in the House of Lords; that the writ of *habeas corpus* issued by the Lords for bring-



CHARLES II.

ing up the body of Sergeant Pemberton was insufficient and illegal; and that they would protect their Sergeant-at-arms, the Lieutenant of the Tower, and all others who should obey the law by conforming to their orders.”

CHAP.
XX.

Shaftesbury, who had brought about this quarrel on purpose to prevent the passing of the Test Act,¹ had gained his object. The next step would have been a battle-royal between the members of the two Houses, and, notwithstanding the disparity of numbers on the side of the Lords, they would have had powerful assistance from the mob, who on this occasion approved of their proceedings. As the only means of obviating so great a calamity, the King suddenly put an end to the session by a prorogation, and Sergeant Pemberton was set at liberty. It was allowed that during the whole affair he had conducted himself with perfect propriety, and he now stood very high in public estimation.²

Shaftesbury's
object in
bringing
about this
quarrel.

Although he felt a great desire for political advancement, he would not enter the House of Commons, and he could not make up his mind boldly to join either of the contending parties. He highly disapproved of the profligate measures of the CABAL, and the succeeding administrations were little more to his mind; but he considered Shaftesbury, the leader of the patriots, as the most unprincipled statesman of the times, and he would sooner have died in obscurity than enlist under his banner. On the contrary, he professed a respect for the Earl of Danby, and he was

A. D. 1675
—1679.
Pemberton's
scruples
and mod-
eration.

1. The Test Act (1673) was a measure passed in the reign of Charles II., and was intended to exclude from office the Catholic councillors of the King. It required all persons holding any office of profit or trust under the Crown to take the oaths of allegiance and supremacy, receive the sacrament according to the rites of the Church of England, and subscribe the declaration against transubstantiation. It was not repealed until 1828.—*Lew and Pulling's Dict. of Eng. Hist.*

2. 6 St. Tr. 1121–1188.

CHAP. XX. loud in bestowing praise on Lord Chancellor Nottingham, who had proved himself the reformer, or rather founder, of our Equity code.

He is placed on the bench as a Puisne Judge, April 30, 1679.

With such scruples and such moderation, there seemed as yet little chance of his ever being made a Chief Justice in those violent times; but, enjoying much reputation as a lawyer, and having given no offence to either side, there was little surprise expressed when he was made a Puisne Judge of the King's Bench, and was knighted. The object of his promotion probably was to support the dignity of that court, which had been very much lowered by the ignorance and brutality of Chief Justice Scroggs.

He gives satisfaction both as a Civil and Criminal Judge.

Sir Francis gave satisfaction both as a Civil and Criminal Judge. In the former capacity, he caused some grumbling among the old stagers by showing, as they alleged, too little respect for precedent and authority; but he was deeply versed in jurisprudence as a science, and he thought it better to be governed by a right principle than by a wrong decision. He sat both in the King's Bench and at the Old Bailey, on the trial of the principal persons said to be implicated in the Popish Plot.

His opinion of the Popish Plot.

Sometimes he gently interfered to mitigate the ferocity of his Chief,—as when he prevailed in having a chair placed for a prisoner at the bar who was unable to stand;¹ and when he got off a bookseller, convicted of publishing a libel, with fine, imprisonment, and pillory,—whom Scroggs wished likewise to have whipped publicly at the cart's tail.² But he never took a bold part in seeking to discredit false witnesses and to save innocent lives. He thought that there was some foundation for the story of the Popish Plot, although it might be greatly exaggerated. For this reason, he would not join Scroggs when that mis-

1. 7 St. Tr. 832.

2. 7 St. Tr. 932.

creant, to please the Government, suddenly wheeled round, and represented Oates and Bedloe as evil spirits, after having hailed them as guardian angels. Thus he gave mortal offence, not only to Scroggs personally, but to the Government, and in less than two years from the time of his appointment he was angrily dismissed.¹

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XX.

He is displaced, and returns to the bar. Feb. 17, 1680.

He returned to the bar, and practised in the Common Pleas before Lord Chief Justice North. Says Roger,—“However some of his brethren were apt to insult him, his Lordship was always careful to repress such indecencies; and not only protected, but used him with much humanity: for nothing is so sure a sign of a bad breed as insulting over the depressed.”²

He immediately recovered his practice, and was in higher estimation than ever. But, with his usual caution, he refrained from taking part in the tremendous struggle which now arose respecting the exclusion of the Duke of York from the throne; saying, “that it was the part of a good subject to respect hereditary right, and to leave any question for altering hereditary succession to the King and the Parliament.”

On his leaving the King’s Bench, that court fell into deeper and deeper disrepute; and, that the state prosecutions meditated after the King’s triumph on the dissolution of the Oxford Parliament might be carried on with any chance of success, it was indispensably necessary that a new Chief Justice should be substituted in the place of Scroggs. After long deliberation and doubt, it was resolved to offer the place to Sir Francis Pemberton. Much reliance was placed

1. Burnet says that “he was turned out entirely by Scroggs’s means;” but offence was taken by the ministers, that he did not sufficiently run at the Popish Plot, which the King now ventured openly to ridicule.

2. Life of Guilford, ii. 125. The biographer, with his usual inaccuracy, refers to Pemberton’s second return to the bar after Guilford, holding the Great Seal, had ceased to preside in the Common Pleas.

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XX.

He is offered the office of Chief Justice of the King's Bench.
A.D. 1681.

on his gratitude if he should receive so high a favor; and it was hoped that his fair character might insure him extraordinary weight with juries. On receiving Lord Nottingham's letter, announcing the King's commands, his perplexity was greater than his pleasure. He was not ignorant that Fitzharris's¹ trial for high treason was pending; that it involved an important question of privilege between the Crown and the House of Commons; that it was sure to be followed by others in which the King was passionately eager to succeed; and that the Whigs against whom they were to be directed, although at present prostrate, were still the heads of a powerful party. He saw at a glance the delicate and difficult situations in which, as the first Criminal Judge of the land, he was sure to be placed; dismissal threatening him on one hand, impeachment on the other. Knowing himself, he dreaded the struggles in his own breast,—his want of moral courage,—and the peril of his doing something dishonorable, of which he might for ever after repent. But to renounce the glory after which he had so long aspired, of having his name enrolled among the Chief Justices of England,—to lose the opportunity of making himself a name as a great magistrate,—to forego the hope of being able to amend the administration of

1. Edward Fitzharris (*d.* 1681). An Irish adventurer, who in 1681 concocted a libel upon the King and the Duke of York, in which he advocated the deposition of the one and the exclusion of the other. This manuscript he probably intended to place in the study of one of the prominent Whig statesmen, and then, by discovering it himself earn the wages of an informer. He was, however, betrayed by an accomplice, and sent to the Tower, where he invented a Popish Plot for the murder of the King, and the boiling down of the leading Whigs into a jelly, to be used for anointing future Popish kings. Fitzharris was impeached by the Commons, but the Lords declared that they had no power of trying a commoner, as that would be a violation of Magna Charta, while the Commons asserted their right of impeachment. The dissolution of Parliament settled the fate of Fitzharris, who was tried for high treason before the King's Bench, and executed.—*Low and Pulling's Dict. of Eng. Hist.*

the law, by enlightening and softening the Government, which, as it was now strong, might easily afford to be merciful,—while he might be obscurely wrangling at the bar with brother sergeants, to see an unprincipled rival grasp the preferment!—He sat down, wrote an acceptance, and on the first day of Easter Term, 1681, he was installed in the office with the usual solemnities.¹

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XX.

After much
hesitation
he accepts

He was hardly warm in his seat, when Fitzharris's trial for high treason came on before him; and although he had been promoted chiefly that he might conduct it with partiality, he finished it to the King's entire satisfaction, and without any damage to his own character.

He tries
Fitzharris
for high
treason.

Fitzharris was a consummate scoundrel, who had offered himself as a witness to both parties, who had deceived both parties, and whom both parties had wished to hang;—the courtiers, by indictment for high treason, according to the course of the common law,—the exclusionists, by parliamentary impeachment. At the Oxford Parliament, the impeachment was voted by the Commons, and rejected by the Lords; and two days afterwards came the dissolution.

In the month of April following, the Attorney General prepared a bill of indictment for high treason, to be presented to the grand jury of the county of Middlesex. In charging the grand jury, the Chief Justice said, "You ought not, and cannot, take any notice of any votes of the House of Commons. You are sworn to inquire of the matters given you in charge. By the opinion of all the Judges you are bound to find a true bill, if there be evidence enough before you to prove the charge."

The prisoner having afterwards pleaded the pendency of the impeachment in abatement, by way of

1. 2 Shower, 159; 1 Ventris, 354.

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Fitzharris's trial, continued.

showing that the Court of King's Bench had not jurisdiction to try him, and the Attorney General having demurred, the question was argued at prodigious length. One Judge was inclined in favor of the plea, but it was overruled, Pemberton merely saying, "My brother Jones and my brother Raymond agree with me that it is bad."

Upon the merits, a strong case was made out against Fitzharris on his own confessions, for he had pretended to be an accomplice in the Popish Plot, and his scheme had been to make money by falsely accusing himself and others. It was likewise proved against him that he had printed a pamphlet advising that the King should be assassinated. He represented that he had been employed as a spy by the Government to distribute it among obnoxious persons, who were to be apprehended with copies of it in their pockets; and he called as his witness the Duchess of Portsmouth, who acknowledged that the King had given him money, although she swore that it was purely as a gratuity. Fitzharris was convicted and executed.

The trial was by no means creditable to any of those who were concerned in it; but I cannot say that any peculiar blame was imputable to Chief Justice Pemberton, for, during the whole proceeding, he perfectly preserved his temper, he laid down no bad law, and he cannot be accused of having perverted the facts. Yet he must have had a suspicion that the case, apparently made out for the Crown, was founded on collusion and artifice; and, although he so managed the trial as to escape public censure, his recollection of it must have caused him a pang for the rest of his days.¹

In the next important case which was tried before

1. 8 St. Tr. 245-426.

him he cannot be said to have violated the law, but his conduct was discreditable to him and to his country. The Most Reverend Dr. Oliver Plunket,¹ titular Archbishop of Armagh, and Primate of the Roman Catholic Church in Ireland, a man of splendid abilities, profound learning, unblemished life, genuine piety, and, what is more to the purpose, of unquestionable loyalty,—who was not only venerated by those of his own religious persuasion, but, having under four successive Lord Lieutenants exerted himself to preserve the peace of the country and to foster English connection, was respected by all enlightened Protestants,—had been accused of being engaged in an Irish Popish plot, which was invented in imitation of that which had enjoyed such prodigious success in England. Instead of assassinating the King, burning London, etc., on which Oates and Bedloe had often dilated, their associates imputed to the Irish Catholic Primate that he had invited a French army to land at Carlingford, that he had enrolled and trained 70,000 native Irishmen to join it, and that, with the combined force, all Protestants in the island were to be extirpated, and Ireland was to be created into an independent Catholic state. There were absurdities and impossibilities in this plan so palpable, that no one, with local knowledge upon the subject, could have believed in its existence; and the prelate must have been safe in the hands of any Irish jury. Therefore,—

1. Oliver Plunket, a Catholic Primate of Ireland, born at Loughcrew, County Meath, 1629. He was educated at Rome, and on July 9, 1669, the Sacred Congregation nominated him Archbishop of Armagh and Primate of all Ireland. At the time of Oates's plot, some miscreants accused him of having abetted a pretended invasion. He was accordingly tried in London, convicted of high treason, and executed at Tyburn, July 1, 1681. It is now universally admitted that he was quite innocent of the offence for which he suffered. An interesting volume of "Memoirs" of this prelate, by the Very Rev. Patrick Francis Moran, D.D., vice-rector of the Irish College at Rome, was published at Dublin in 1861.—*Cooper's Biog. Dict.*

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Pemberton
tries the
Roman
Catholic
Primate of
Ireland.

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bishop
Plunket's
trial, con-
tinued.

under an English act of parliament, passed in the reign of Henry VIII., which gave a right to try in England high treason committed in any of the dominions of the Crown,—after he had been confined some months in Dublin, he was brought over to London in bonds, and lodged in Newgate. A prosecution for high treason was then commenced against him before the Court of King's Bench at Westminster.

On his arraignment, he pointed out the extreme hardship and injustice of being carried away from his native land, and brought to be tried among strangers, who were not only ignorant of his character, but were very imperfectly acquainted with localities, circumstances, and customs, upon which the credibility of the witnesses against him must greatly depend, and who might have a strong prejudice against him, his country, and his religion :

Pemberton, C. J.: “Mr. Plunket, you shall have as fair a trial as if you were in Ireland. You are here by a statute not made on purpose to bring you into a snare, but an ancient statute, and not without precedents of its having been put in execution before your time; for your own country will tell you of O'Rourke and several others that have been arraigned and condemned here for treason done there. Your trial shall be by honest persons according to the laws which obtain in this kingdom.”

The Archbishop prayed that his trial might be postponed for ten days, because, by reason of adverse winds, his witnesses had not arrived; but he was told by the Chief Justice that a longer time had been allowed him to prepare for trial than was usual in such cases. Thus commenced the address of Sir Robert Sawyer,¹ the Attorney General: “May it please

1. Sir Robert Sawyer, an English lawyer and statesman, rose to be Attorney General in 1680. He was afterwards a member of Parliament for the University of Cambridge. He was accessory to the death of Lord Russell. Died in 1692.—*Thomas' Biog. Dict.*

your Lordships, and you, gentlemen of the jury, the character this gentleman bears, as primate under a foreign and usurped jurisdiction, will be a great inducement to you to give credit to that evidence which we shall produce before you to prove his guilt. He obtained this very preferment upon a promise to raise 60,000 men in Ireland for the Pope's service, to settle Popery there, and to subvert the government." And in the same strain he continued, without any check from the bench. It was in vain that the Archbishop pointed out the utter impossibility of a French army being landed at Carlingford, and the preposterous nature of the charge that he had drilled 70,000 armed men, as he had only used spiritual weapons against impiety and vice. The fatal verdict being recorded, Chief Justice Pemberton thus pronounced sentence :

"Look you, Mr. Plunket, you have been here indicted of a very great and heinous crime—the greatest and most heinous of all crimes—and that is, high treason ; and, truly, yours is of the highest nature : it is a treason, in truth, against God and your King, and the country where you lived. You have done as much as you could to dishonor God in this case ; for the bottom of your treason was, your setting up your false religion, than which there is not anything more displeasing to God or more pernicious to mankind, a religion which is ten times worse than all the heathenish superstitions, the most dishonorable and derogatory to God and his glory of all religions or pretended religions whatsoever, for it undertakes to dispense with God's laws, and to pardon the breach of them ; so that, certainly, a greater crime there cannot be committed against God, than for a man to encourage its propagation. I do now wish you to consider, that you are near your end. It seems you have lived in a false religion hitherto ; but it is not too late at any time to repent. I trust you may have the grace to do so. In the mean time, there is no room for us to grant you any kind of mercy, though I tell you we are inclined to pity all malefactors." *Archbishop* : "If I were a man such as your Lordship conceives me to be, not thinking of God Almighty or heaven or hell, I might have saved my life, for it has been often offered to me if

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Arch-
bishop
Plunket's
trial con-
tinued.

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Arch-
bishop
Plunket's
trial, con-
tinued.

I would confess my own guilt and accuse others; but, my Lord, I would sooner die ten thousand deaths." *Chief Justice*: "I am sorry to see you persist in the principles of that false religion which you profess." *Archbishop*: "These, my Lord, are principles that even God Almighty himself cannot dispense withal." *Chief Justice*: "Well, however that may be, the judgment which we must give you is that which the law prescribes, 'you must go from hence to the place from whence you came, that is Newgate, and from thence you shall be drawn through the City of London to Tyburn; there you shall be hanged by the neck, but cut down before you are dead.'" etc., etc. *Archbishop*: "I hope I may have this favor, for a servant and some few friends now to be with me." *Chief Justice*: "I know nothing to the contrary. But I would advise you to have some minister to come to you, some Protestant minister. We wish better to you than you do to yourself." *Archbishop*: "God Almighty bless your Lordship! And now, my Lord, as I am a dead man to this world, and as I hope for mercy in the next, I was never guilty of any of the treasons laid to my charge, as you will know in due time."

The sacraments having been administered to him according to the rites of his church by a brother convict, the Archbishop was, a few days afterwards, drawn through the streets of London on a hurdle, and, having again protested his innocence and forgiven his enemies, he was put to death with all the revolting cruelties enumerated to him when he received sentence. Protestant zeal only desired one addition to the sacrifice—that the victim should have been decked in full canonicals as Popish Primate of all Ireland.¹

For some unaccountable reason, the Government was incensed against Plunket, and therefore Pemberton convicted him according to the rules of law. Mr. Fox observes, that "the King, even after the dissolution of his best parliament, when he had so far subdued his enemies as to be no longer under any apprehensions

1. 8 St. Tr. 447-500.

from them, did not think it worth while to save the life of Plunket, of whose innocence no doubt could be entertained."¹

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I now come to the most exceptionable passage in the life of Chief Justice Pemberton. While the King was nearly indifferent about Plunket, he was more eager than he had ever been in pursuit of any object during his reign,—to bring Shaftesbury to the scaffold; and this he knew would be accomplished as soon as he could get a bill of indictment found against him by a grand jury, for the doomed patriot would then have perished by a partial selection of peers in the Court of the Lord High Steward. To induce the grand jurors to find the bill, Pemberton, although, as a lawyer, he was well aware that they ought first to have had a *prima facie* case of guilt made out, thus addressed them:

Pemberton
strives to
induce the
grand jury
to find an
indictment
against
Lord
Shaftes-
bury.

"Look ye, gentlemen, I must tell you that which is referred to you is to consider whether there be any reason or ground for the King to call to account those who are accused; if there be probable ground, it is as much as you can inquire into. Where there is no kind of suspicion of a crime, nor reason to believe that the thing can be proved, it is not for the King's honor to call men to account; but a probable cause is enough. As it is a crime to condemn innocent persons, so it is a crime as great to acquit the guilty. That God who requires the one, requires both; and let me tell you, if any of you shall be refractory, and will not find a bill where there is a probable ground for an accusation, you do thereby intercept justice, and make yourselves criminals."

Contrary to usage and law, he further ruled that the witnesses on whose evidence the grand jury were to act should be examined in open court; and, in conjunction with North, who outdid him in servility, he resorted to the most unworthy arts of intimidation and cajolery to obtain the finding of a *true bill*; but the juries were still returned by Whig sheriffs, the fran-

His unlaw-
ful ruling.

1. Fox's History of James II.

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chises of the City of London remaining in force. The bill was returned *IGNORAMUS*, and Shaftesbury was saved.¹ There is no more striking proof of the depraved state of public morality in those days than that, after such an instance of dastardly compliance with the wishes of the King, Pemberton should still have been considered a judge to be respected, by comparison, for independence and integrity.

Trial of
Lord Grey
de Werke
for the se-
duction of
Lady Har-
riet
Berkeley.

Whether he thought that, on the last occasion, he had gone too far to please the Government, and now wished to seize an opportunity of putting on a show of impartiality, I know not; but, on the trial of Lord Grey de Werke, indicted before him for carrying off and seducing the Lady Harriet Berkeley, daughter of the Earl of Berkeley,—although the King was desirous of a conviction because the defendant was a Whig, Chief Justice Pemberton conducted himself unexceptionably. He properly ruled that the young lady herself was a competent witness; and, in summing up to the jury, he said—

“The question before you is, whether there was any unlawful solicitation of this lady’s love, and whether there was any inveiglement of her to withdraw herself and run away from her father’s home without his consent, and whether my Lord Grey did frequent her company afterwards? Her mother and sisters make out a strong case to support the indictment; but she denies it all, and I must leave it to you which story you will believe.”

After the trial was over, Pemberton, with great spirit, quelled a riot which arose in Westminster Hall respecting the custody of the Lady Harriet, her father laying hold of her against her will, and she, in collusion with her paramour, pretending that she was married to another man, who claimed her. Swords were drawn, and a conflict was begun, but the Chief Justice

1. 8 St. Tr. 759-842; Lives of Chancellors, iii. ch. xc.

sternly rebuked the combatants, and by his interposition tranquillity was restored without effusion of blood.¹

It might have been supposed that the King and his ministers would have had confidence in Chief Justice Pemberton, but, in spite of the zealous assistance he had given in the plan to hang Lord Shaftesbury, he was now removed from his office as untrustworthy. While the charters of the City of London remained by which the citizens were empowered to elect sheriffs, who returned juries both for the City of London and for the County of Middlesex, there was no certainty that the best endeavors of the most obsequious judges to cut off Whig leaders might not be rendered abortive by a conscientious verdict. A *quo warranto* suit had, therefore, been instituted, for the purpose of having all the charters of the City declared forfeited, so that the King might remodel its municipal constitution in the way best calculated to gain his own ends. This suit had been advised by the subtlest of special pleaders—EDMUND SAUNDERS, and he had drawn the *quo warranto*, and conducted all the proceedings as counsel for the Crown to the stage where it was ripe for being finally argued and determined in the Court of King's Bench. The constitution of the country was supposed to depend upon the result. If the citadel of freedom should be taken in the assault, despotism would be permanently established; but failure would revive agitation, and might render the calling of a parliament indispensable.

1. 9 St. Tr. 127-186. Macaulay describes this as "a scene unparalleled in our legal history. The seducer appeared with dauntless front, accompanied by his paramour. Nor did the Whig Lords flinch from their friend's side even in that extremity. In our time such a trial would be fatal to the character of a public man; but in that age the standard of morality among the great was so low, and party spirit was so violent, that Grey still continued to have considerable influence, though the Puritans, who formed a strong section of the Whig party, looked somewhat coldly upon him."—Vol. i. pp. 529, 530.

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A.D. 1682.
Cause of
Pemberton's re-
moval from
the office of
Chief Justice of the
King's
Bench.

The Lon-
don QCO
WAR-
RANTO.

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Every thing depended on the Chief Justice of the King's Bench. Had the prosecution been well founded, Pemberton would have been very readily trusted with it; but, unfortunately, all lawyers knew that if the slightest regard were paid to the principles of law or to former decisions, there must be judgment in favor of the City of London. The courtiers were aware that Pemberton was not entirely devoid of conscience, and that there were limits to his aberrations from rectitude beyond which he would not trespass. To give him a chance, he was sounded by the Attorney General, in a manner not unusual, respecting the *quo warranto* against the City,—when he returned an ambiguous answer.

Pemberton
is made
Chief Jus-
tice of the
Common
Pleas.

The bold resolution was taken to cashier him, and to substitute for him EDMUND SAUNDERS, about whom there could be no misgiving. Notwithstanding Pemberton's merits and past services, he would at once have been reduced to the ranks, but it luckily happened that the inferior office of Chief Justice of the Common Pleas was vacant. This was offered to him as a *solatium*, and he had the meanness to accept it. Sir Thomas Raymond, in giving an account of Saunders's installation, says "he was placed Chief Justice of the said Court in the room of Sir Francis Pemberton, who was the day before sworn Chief Justice of the Common Pleas *at his own* desire, for that it is a place (tho' not so honorable) yet of more ease and plenty, as the Lord Keeper said in his speech to Saunders."¹ But, says Roger North, who had a spite against Pemberton, "the truth is, it was not thought any way reasonable to trust that cause, on which the peace of the Government so much depended, to a chief who never showed so much regard to the law as to his will, and notorious as he was for little honesty,

¹ Sir T. Raymond, 473.

boldness, cunning, and incontrollable opinion of himself." It may be amusing to read his arguments by which such proceedings were gravely and unblushingly defended: CHAP.
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"It will be proper to solve a question much tossed about in those days, whether the Court was not to blame for appointing men to places of judgment where great matters of law and of mighty consequence depended to be heard and determined, whose opinions were known beforehand. All governments must be intrusted with power, which may be used to good or ill purpose. Here a government is beset with enemies ever watching for opportunities to destroy it, and having a power to choose whom to trust, the taking up men whose principles are not known is more than an even chance that enemies are taken into their bosom. Would they not be sure of men to judge whose understandings and principles were foreknown? What is the use of power but to secure justice? It is a maxim of law, that *fraud is not to be assigned in lawful acts*. If governments secure their peace by doing only what is lawful to be done, all is right. If they suffer encroachments, and at length dissolution, for want of using such powers, what will it be called but stupidity and folly?" ¹

Sir Francis Pemberton being thus removed from the office of Chief Justice of the King's Bench to make way for one who not only had never been in office before and had not even worn a silk gown, but besides was of the lowest origin and of the most vulgar habits—felt the degradation keenly, and, instead of rejoicing in his slender integrity, expressed regret that he had not been more uniformly complying. But if he was to walk behind Saunders, who had "nine issues in his back," it was some consolation to him that he was to be still "My Lord," and to receive higher emoluments than he could expect at the bar. He was sworn in Chief Justice of the Common Pleas, at the Lord Chancellor's private house,—to avoid speeches Effect on
Pember-
ton.

1. Life of Guilford, ii. 121.

CHAP. XX. in open court, which might have been very awkward on both sides.¹

Outcome of the London QUO WARRANTO. The QUO WARRANTO proceeded. Judgment was given against the City; all its charters, granted by so many sovereigns, were declared to be forfeited; all its privileges were annihilated; and the Government had now the unlimited power of packing juries in London and Middlesex.²

A.D. 1683. Office of Chief Justice of the King's Bench again vacant. But Saunders had lost his life in the wound which he had inflicted on the constitution, and the office of Chief Justice of the King's Bench was again vacant. It might have been restored to Pemberton had there not been another candidate for it, who was destined to throw into the shade all past judicial delinquency. Some months intervened before the new law arrangements could be completed. In this interval the Rye House Plot³ was discovered, and, those implicated in it being about to be tried, Pemberton was placed at the head of the Commission, the Government thinking that, notwithstanding his secret resentment, he had motives sufficient to keep him steady in the hope of restitution and the dread of further disgrace.

Trial of Walcot. The case of Colonel Walcot was taken first; and here there was no difficulty, for he had not only

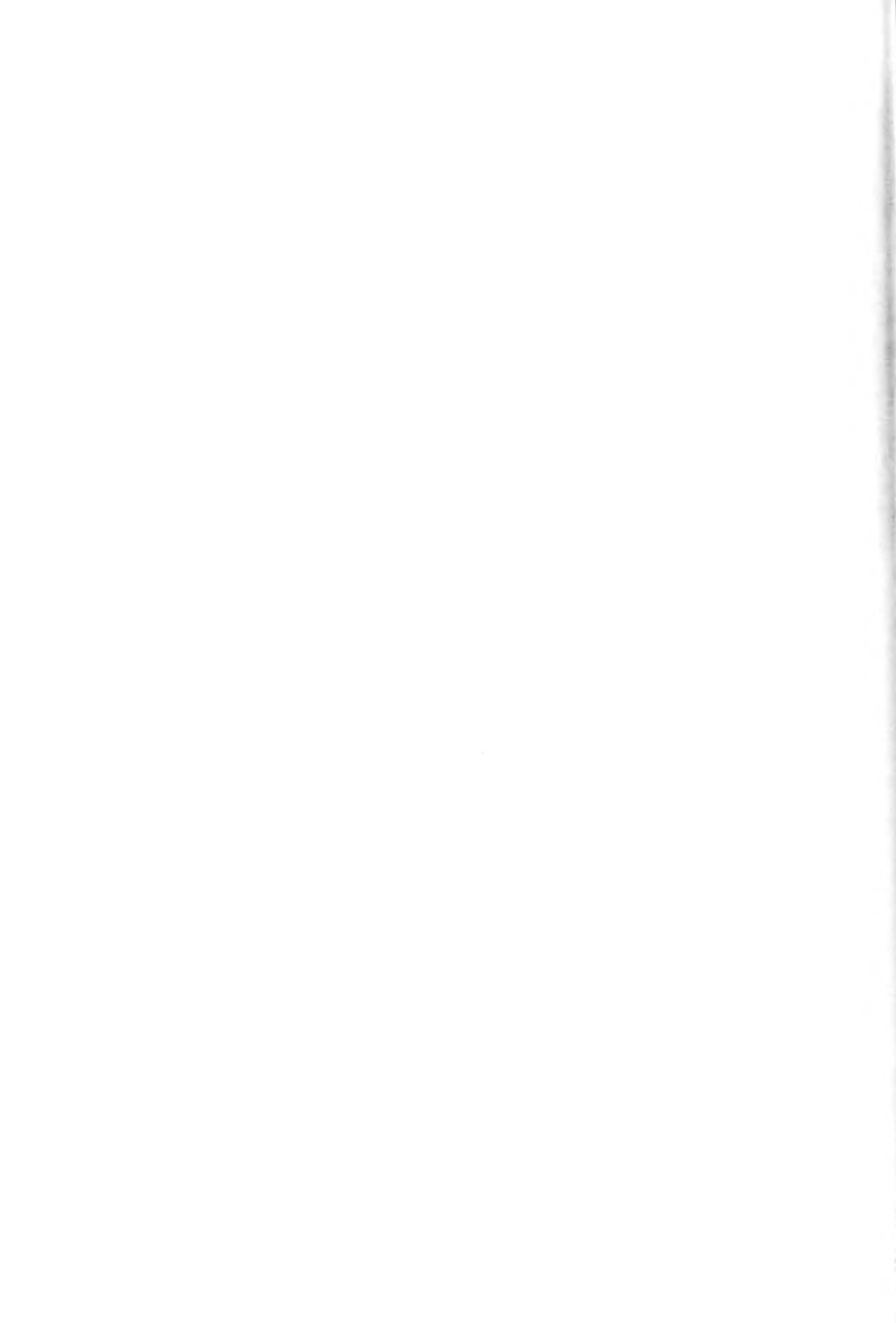
1. Sir Thomas Raymond, 251; Burnet, O. T., ii. 185, 188.

2. 8 St. Tr. 1039.

3. The Rye House Plot (1683) is the name given to a conspiracy formed by some of the extreme Whigs in Charles II.'s reign, after the failure of the Exclusion Bill; its object was the murder of the King and the Duke of York. The King was to have been murdered at a place called the Rye House, in Hertfordshire; but the plot never came to anything, and was revealed to the Court by traitors among those concerned in it. It is not probable that the prominent Whig leaders were privy to this scheme, which was chiefly formed by Rumbold and some of the more violent and obscure members of the party. But William Lord Russell, Algernon Sidney, and the Earl of Essex were arrested for complicity in it. Essex died in the Tower, probably by his own hand; Russell was condemned on the evidence of one witness and executed, together with Sidney (July 21, 1683), at whose trial unpublished writings of his own were admitted as evidence against him.—*Low and Pulling's Dict. of Eng. Hist.*



THE RYE HOUSE.
After an Old Print.



joined in planning an insurrection against the Government, but was privy to the design of assassinating the King and the Duke of York, and, in a letter to the Secretary of State, he had confessed his complicity, and offered to become a witness for the Crown. This trial was meant to prepare the public mind for that of Lord Russell, the great ornament of the Whig party, who had carried the Exclusion Bill through the House of Commons, and, attended by a great following of Whig members, had delivered it with his own hand to the Lord Chancellor at the bar of the House of Lords. In proportion to his virtues was the desire to wreak vengeance upon him. But the object was no less difficult than desirable, for he had been kept profoundly ignorant of the intention to offer violence to the royal brothers, from the certainty that he would have rejected it with abhorrence; and although he had been present when there were deliberations respecting the right and the expediency of resistance by force to the Government after the system had been established of ruling without parliaments, he had never concurred in the opinion that there were no longer constitutional means of redress,—much less had he concerted an armed insurrection. Notwithstanding all the efforts made to return a prejudiced jury, there were serious apprehensions of an acquittal.

Pemberton, the presiding Judge, seems to have been convinced that the evidence against him was insufficient; and although he did not interpose with becoming vigor, by repressing the unfair arts of Jeffreys, who was leading counsel for the Crown, and although he did not stop the prosecution as an independent judge would do in modern times, he cannot be accused of any perversion of law; and, instead of treating the prisoner with brutality, as was wished

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XX.

Lord Russell's Case.

July 13.
Courteous
demeanor
of Pemberton to Lord
Russell.

CHAP. XX. and expected, he behaved to him with courtesy and seeming kindness.

Lord Russell, on his arraignment at the sitting of the Court in the morning, having prayed that the trial should be postponed till the afternoon, as a witness for him was absent, and it had been usual in such case to allow an interval between the arraignment and the trial, Pemberton said, "Why may not this trial be respite till the afternoon?" and the only answer being the insolent exclamation "Pray call the jury," he mildly added, "My Lord, the King's counsel think it not reasonable to put off the trial longer, and we cannot put it off without their consent in this case."

Tender-
ness and
heroism of
Lady
Russell.

The following dialogue then took place, which introduced the touching display of female tenderness and heroism of the celebrated Rachel Lady Russell assisting her martyred husband during his trial—a subject often illustrated both by the pen and the pencil.

Lord Russell : "My Lord, may I not have the use of pen, ink, and paper?" *Pemberton* : "Yes, my Lord." *Lord Russell* : "My Lord, may I not make use of any papers I have?" *Pemberton* : "Yes, by all means." *Lord Russell* : "May I have somebody write to help my memory?" *Attorney General* : "Yes, a servant." *Lord Russell* : "My wife is here, my Lord, to do it." *Pemberton* : "If my Lady please to give herself the trouble."

The Chief Justice admitted Dr. Burnet, Dr. Tillotson,¹ and other witnesses, to speak to the good charac-

1. John Tillotson, a celebrated prelate, was the son of a clothier at Sowerby, Yorkshire, and born there October, 1630. Going to Clare Hall, Cambridge, he obtained a fellowship, and took his master's degree 1654. Two years after this he became tutor to the son of Edmund Prideaux, at Ford Abbey, Devonshire. At the Restoration he conformed to the Established Church, and in 1662 was elected minister of St. Mary, Aldermanbury, but declined accepting it, and was presented to the rectory of Keddington, Suffolk, which he resigned on being chosen preacher to the Society of Lincoln's Inn. In 1664 he was elected Tuesday Lecturer at St. Lawrence, Jewry, and in 1666 he took his doctor's degree. In 1668 he

ter and loyal conversation of the prisoner, and gave weight to their testimony, notwithstanding the observation of Jeffreys that "it was easy to express a regard for the King while conspiring to murder him." In summing up to the jury, after alluding to the witnesses called by the prisoner "concerning his integrity and course of life," he said,—

"Now, the question before you will be, whether, upon this whole matter, you do believe my Lord Russell had any design upon the King's life, for that is the material part here. It is given you by the King's counsel as an evidence of this, that he did conspire to raise an insurrection, and to surprise the King's guards, which, say they, can have no other end but to seize and destroy the King. It must be left to you upon the whole matter. You have not evidence in this case as you had in that tried yesterday, of a conspiracy to kill the King at the Rye. There, direct evidence was given of a consult to kill the King, which you have not here. If you believe the prisoner at the bar to have conspired the death of the King, and in order to that to have had the consults the witnesses speak of, you must find him guilty of the treason laid to his charge."

The jury retired, and the courtiers present were in a state of the greatest alarm; for against Algernon Sydney, who was to be tried next, the case was still weaker; and if the two Whig chiefs, who were considered already cut off, should recover their liberty, and should renew their agitation, a national cry might be got up for the summoning of Parliament, and a new effort might be made to rescue the country from a

CHAP.
XX.

Pemberton's summing up.

The courtiers alarmed, but the jury's verdict dispels their fears.

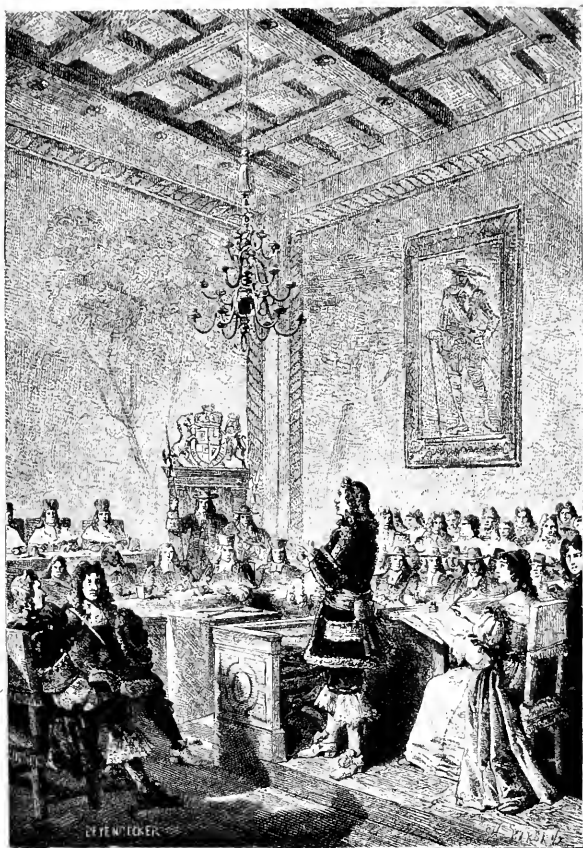
preached the sermon at the consecration of Bishop Wilkins, whose daughter-in-law he married. In 1670 he was made Prebendary of Canterbury, and two years afterwards Dean of that church. He attended Lord Russell previous to his execution; and it is remarkable that both the dean and Dr. Burnet endeavored to convince that unfortunate nobleman of the sin of resisting the supreme powers. After the Revolution, Dr. Tillotson was appointed Clerk of the Closet, and, on the deprivation of Sancroft, was consecrated Archbishop of Canterbury, May 31, 1691. This promotion created him several enemies, and he was by many considered as the author of a schism in the Church of England. He died at Lambeth, Nov. 24, 1694.—*Cooper's Biog. Dict.*

CHAP. XX. Popish successor. These fears were vain. The jury returned a verdict of GUILTY, and Lord Russell expiated on the scaffold the crime of trying to preserve the religion and liberties of his country.

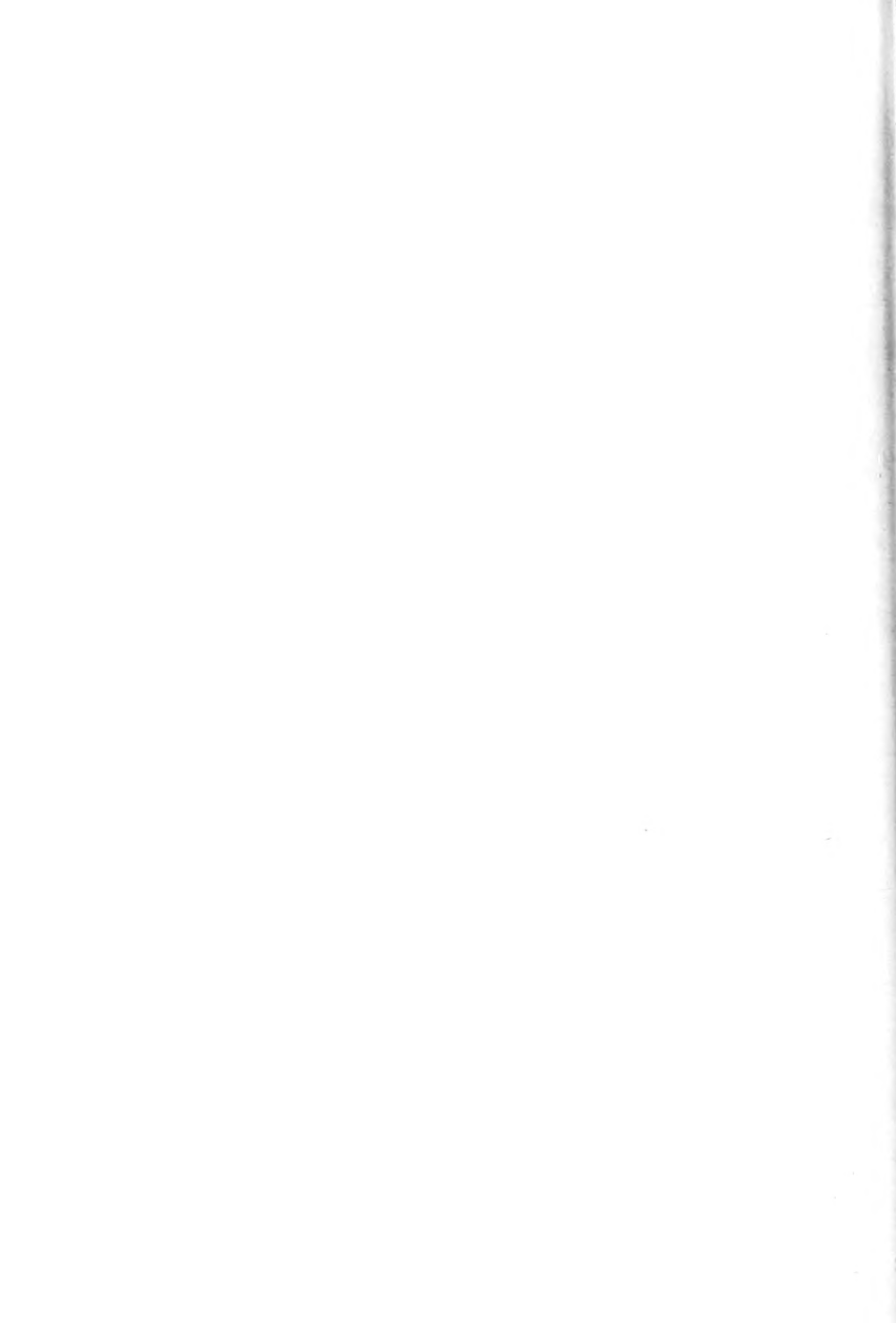
Determination to dismiss Pemberton from being a Judge. But Pemberton was not to be forgiven the anxiety he had occasioned. Notwithstanding the want of moral courage and the subserviency he had displayed during Lord Russell's trial, complaint was truly made that hitherto there never had been an instance of a state offender, whom the Government were desirous of convicting, being treated with so much moderation, and being allowed such a fair chance of escaping. It was determined that Sydney should be tried before a Judge who would make sure work of him, and that as Pemberton had not taken warning by his removal from the office of Chief Justice of the King's Bench, and as he was so irreclaimably irresolute that no dependence could be placed upon him, he should be for ever deprived of all judicial employment. Accordingly a *supersedeas* passed the Great Seal, by which he was dismissed from the office of Chief Justice of the Common Pleas; Jones, untroubled by scruples, was appointed to succeed him; and Jeffreys, promoted to be Chief Justice of the King's Bench, was the remorseless murderer of Sydney.¹ At the same time Pemberton was expelled from the Privy Council, into which he had been admitted a member when he was made Chief Justice of the King's Bench.

Sept. 29. He is expelled from the Privy Council. His decisions in civil cases. Before I again accompany him to the bar, I ought to say something of his decisions in civil cases while he remained on the bench. Roger North's grudge against him, for having a hankering after honesty and independence, leads him to say "he was a better practitioner than a judge; for he had a towering opinion of his

1. 2 Shower, 318.



TRIAL OF LORD RUSSELL.



own sense and wisdom, and rather made than declared law: I have heard his Lordship say, that *in making law he had outdone King, Lords, and Commons.*" This jocular boast he very likely made, for it is quite consistent with his having done his duty as an enlightened magistrate. With us, the rules of property fixed by act of parliament bear an infinitesimally small proportion to those fixed by the common law, and the common law is made up of judicial decisions. New combinations of facts are constantly arising and producing new questions of law; the determination of each of these may be considered a new law, for it lays down a rule to be followed in time to come, and the reports of our courts of justice are far more voluminous than the statute book. Pemberton did not publish any of his own judgments, and he was by no means fortunate in having a good reporter; but, making allowance for the inaccuracies and the barbarous dialect of *Ventris, Shower, Sir Thomas Jones, and Sir Thomas Raymond*, he seems to have proceeded generally on sound principles of jurisprudence, and by no means to have been wanting in respect for the authority of his predecessors. The only bad decisions to be laid to his charge are those against the privileges of the House of Commons, for which he was punished by the Convention Parliament, and which it will afterwards be my duty to explain.

He was particularly celebrated as a good *nisi prius* Judge. Sir Henry Chauncy says, "He would not suffer lawyers, on trials before him, to interrupt or banter witnesses in their evidence, but allowed every person liberty to recollect their thoughts, and to speak without fear, that the truth might be better discovered."¹

1. See Clutterbuck's Herts, i. 52.

CHAP.
XX.

His regard
for sound
principles
of juris-
prudence
and for
the author-
ity of pre-
decessors.

His repu-
tation as a
nisi prius
Judge.

CHAP.
XX.
He a third
time com-
mences
practice at
the bar.

Although he was now in his sixtieth year, he resolved the third time in his life to begin to practise at the bar; and, having been several years a Chief Justice, and called LORD PEMBERTON,¹ he became once more *Mr. Sergeant*.

He immediately again got into extensive business, and he was engaged in the most important trials which took place, both civil and criminal, till the landing of the Prince of Orange—a period of five years. He sat usually in the Common Pleas, but he occasionally went into the King's Bench, and practised before Jeffreys, notwithstanding their former squabbles when Pemberton was on the bench and Jeffreys was at the bar.²

A.D. 1688.
He is
counsel for
the Seven
Bishops.

The grand trial coming on which proximately produced the Revolution, the ex-Chief Justice was counsel for the Seven Bishops, along with a strange mixture of counsel of different parties and principles—Sawyer and Finch, who, as Attorney and Solicitor General for Charles II., had prosecuted Russell and Sydney; Pollexfen,³ the Whig leader of the Western

1. The Chiefs were Lords simply by their surnames. Hence we speak at this day of Lord Coke, Lord Hale, and Lord Holt.

2. 10 St. Tr. 567.

3. Henry Pollexfen derives his descent from one of the branches of an ancient Devonshire family. He was the eldest son of Andrew Pollexfen, of Shorforde in that county, and was born about 1632. In 1658 he was called to the bar by the Inner Temple, and arrived at the dignity of bencher in 1674. Long before that date he had made himself prominent in the courts, and soon acquired a lead in the state prosecutions, principally for the defence. Roger North says he "was deep in all the desperate designs against the Crown," and was "a thoroughstitch enemy to the Crown and monarchy." It therefore excited considerable surprise that Chief Justice Jeffreys should select him to conduct the prosecutions in the bloody western assize against the victims of Monmouth's rebellion. From the reports of the trials he does not appear to have done more than his usual duty of stating the case for the prosecution. Before the end of James's reign he resumed his original position, and on the trial of the Seven Bishops in June, 1688, he was offered a retainer on their behalf, which he refused to accept unless Mr. Somers were associated with him. This being reluctantly conceded, as the Bishops thought Somers too young and inexperienced, Pollexfen exerted himself zealously for his

Circuit, who had shared with Jeffreys the obloquy of the "Bloody Assizes;"¹ Levinz, who, returning to the bar when displaced from the bench for a show of independence, was now induced to take a brief against the Crown by a threat of the attorneys that, if he refused it, he should never hold another; Treby,² the ex-Recorder of London, who had been turned out when the City was disfranchised; and Somers,³ hitherto only known for learning and ability by a few private friends,—hereafter to be immortalized as the author of the Bill of Rights, and the chief founder of the constitutional government under which we now live. They forgot all past differences and animosities, and nobly struggled in defence of their illustrious

CHAP.
XX.

Somers the
junior
counsel.

reverend clients, and Somers justified the recommendation of his discriminating patron by the effective assistance he afforded. Pollexfen's strong opinions on King James's desertion of the Government, and in favor of the establishment of the Prince of Orange, were so well known that he was one of the lawyers summoned by the Peers to advise them on the emergency, and was returned for the city of Exeter to the Convention Parliament. In February, 1689, he received the appointment of Attorney General and the honor of knighthood, and when the nomination of judges took place he was made Chief Justice of the Common Pleas on May 4.—*Foss's Lives of the Judges*.

1. A term often applied to the summer assizes of 1685, held in the Western Circuit after Monmouth's rebellion, when Chief Justice Jeffreys sentenced more than three hundred rebels to death for treason after the barest mockery of a trial.—See Macaulay's *Hist. of Eng.*, vol. i. p. 191.

2. Sir George Treby, an English jurist, born in Devonshire in 1644, was elected to Parliament for Plympton in 1678, and subsequently rose to be Attorney General and Chief Justice of the Common Pleas in the reign of William III. Died in 1702.—*Thomas' Biog. Dict.*

3. Macaulay says, "The junior counsel for the Bishops was a young barrister named John Somers. He had no advantages of birth or fortune, nor had he yet had any opportunity of distinguishing himself before the eyes of the public; but his genius, his industry, his great and various accomplishments, were well known to a small circle of friends; and, in spite of his Whig opinions, his pertinent and lucid mode of arguing and the constant propriety of his demeanor had already secured to him the ear of the Court of King's Bench. The importance of obtaining his services had been strongly represented to the Bishops by Johnstone; and Pollexfen, it is said, had declared that no man in Westminster Hall was so well qualified to treat an historical and constitutional question as Somers."—Vol. ii. p. 112.

CHAP. clients. In ex-Chief Justice Pemberton was seen a
XX. wonderful union of zeal, discretion, learning, and eloquence, and "through the whole trial he did his duty manfully and ably."¹

June 15,
1688.
Questions
to whether
the
Bishops
were
legally im-
prisoned.

The first point which he made, when the Bishops were brought from the Tower and charged with the information, was,—“that they were illegally in custody, and therefore were not then bound to plead.”

Pemberton, Sergeant: “Good my Lord, will you please to hear us a little to this matter?” *L. C. J.*: “Brother Pemberton, we will not refuse to hear you—by no means—but not now; for the King is pleased, by his Attorney and Solicitor General, to charge these noble persons, my Lords the Bishops, with an information.” *Pemberton, Sergt.*: “Pray, my Lord, spare us a word: if we are not here as prisoners regularly before your Lordship, and are not brought in by due process, the Court has not power to charge us with the information; therefore we beg to be heard on the question, whether we are legally here before you?”

The objection being overruled, Pemberton offered a plea to be put upon the record “that the defendants, as peers of parliament, were privileged from arrest in such a case;” but this the Court refused to receive, and the Bishops were obliged to plead *not guilty*.

June 20.

When the jury had been sworn, the charge was opened against the defendants that they had written and published, in the county of Middlesex, a false, malicious, and seditious libel² (meaning the respectful

1. Macaulay's History, i. 379.

2. The law of libel has always been somewhat indefinite in England. “Before the Revolution of 1688 it was held,” says Mr. Hallam, “that no man might publish a writing reflecting on the Government, nor upon the character, or even capacity and fitness, of any one employed in it,” even though, as in the case of Tutchin, such reflection was merely general. Under William III. and Anne, prosecutions for libel were frequent, while it became an established principle that falsehood was not essential to the guilt of a libel. Under George III. the law became still further strained. A publisher was held liable for the act of his servant committed without his authority, and Lord Mansfield, in the case of

Petition which they had presented to the King, praying that his Majesty would recall his order for the clergy to read the Declaration of Indulgence, issued contrary to the Test Act.¹ But the first difficulty was to prove their signatures to the Petition, and an acquittal was about to take place, when the Crown counsel put into the witness-box Mr. Blathwayt, the clerk of the Council, who swore that, when they were summoned before the King, they owned their signatures to the Petition; but Pemberton insisted, in cross-examination, upon having all that had passed between the King and the Bishops fully stated :

CHAP.
XX.

Pemberton's cross-examination of the clerk of the Council.

Williams, S. G.: "That is a pretty thing, indeed!" *Pooreys, A. G.*: "Do you think you are at liberty to ask our witnesses

Woodfall, the printer of the *Letters of Junius*, went so far as to hold that the jury had only to determine the fact of publication; the decision of the criminality of the libel resting with the judge alone. The hardship with which persons accused of libel were treated led to Fox's Libel Act, which passed in 1792, and declared, in opposition to the judges, that the jury might give a general verdict on the whole question at issue, although the judges were still allowed to express any opinion they pleased. In 1817 Lord Sidmouth's circular to the lord lieutenants of counties, informing them that justices of the peace might issue a warrant to apprehend any person charged on oath with the publication of a blasphemous or seditious libel, and compel him to give bail to answer the charge, called forth great opposition, though it was to a large extent acted upon. In 1820 one of the *Six Acts* increased the punishments for libel. In 1843 the law of libel was still further amended by Lord Campbell's Act, which allows a defendant to plead that the publication was without his authority, and was from no want of care on his part, whilst he may also plead that a libel is true and for the public benefit. In 1839 the decision in *Stockdale v. Hansard*, that the House of Commons cannot legalize the publication of libellous matter, by ordering it to be printed as a report, led to an act in the following year, which provides that no proceedings can be taken in respect of any publications ordered by either House of Parliament. In 1868 it was held by Lord Chief Justice Cockburn, in an action brought against the proprietor of the *Times*, that "criticism of the Executive is at the present time so important that individual character may be sacrificed."—*Low and Pulling's Dict. of Eng. Hist.*

1. The information stated a conspiracy to defame the King, alleging the writing and publication of the libel as the overt act; but notwithstanding this technicality, which is hardly worth noticing, the prosecution was in reality for writing and publishing the libel, and is so treated throughout the whole trial.

CHAP. XX. any impertinent question that comes into your head?" *Pemberton*: "The witness is sworn to tell the truth, and the whole truth, and an answer we must and will have." *Pocys, A. G.*: "If you persist in asking such a question, tell us, at least, what use you mean to make of it." *Pemberton, Sergt.*: "My Lords, I will answer Mr. Attorney. I will deal plainly with the Court. If the Bishops owned this paper under a promise from his Majesty that their confession should not be used against them, I hope that no unfair advantage will be taken of them." *Williams, S. G.*: "You put on his Majesty what I dare hardly name. Since you are so pressing, I demand for the King that the question may be recorded." *Pemberton*: "Record what you will, I am not afraid of you, Mr. Solicitor."¹

The Bishops' signatures held to be proved.

After a long altercation, the questions were allowed to be put; and it appeared from the answers that, although the King had made no express promise that advantage should not be taken of the admission of the Bishops, they had admitted their handwriting on this understanding. The signatures were held to be proved.

Difficulty in proving a publication in Middlesex.

But a still greater difficulty arose in showing that there had been any publication of the supposed libel in the county of Middlesex:

Pemberton, Sergt.: "To say the writing and subscribing of their names is a publication of that paper, is such doctrine truly as I never heard before. Suppose this paper had been in my study subscribed by me, but never went further, would this have been a publication? but the publication must be proved to have been in the county of Middlesex." *Pocys, A. G.*: "Look you; it does lie upon you to prove it was done elsewhere than in Middlesex." *Pemberton, Sergt.*: "Sure, Mr. Attorney is in jest." *L. C. J.*: "Pray, brother Pemberton, be quiet. If Mr. Attorney says anything he ought not to say, I will correct him; but pray do not, you who are at the bar, interrupt one another."

1. At this time, leading questions were not allowed to be put in cross-examination, more than in examination-in-chief; and I am not sure that the old rule is not the best one—when I consider the monstrous abuse sometimes practised in putting words into the mouth of a friendly witness, necessarily called by the side he is opposed to.



THE COUNSEL FOR THE SEVEN BISHOPS.
After an Old Print.



The Court having finally ruled that there was not sufficient evidence of a publication in Middlesex, the Chief Justice was beginning to direct the jury to find a verdict of acquittal, when Finch, one of the counsel for the Bishops, offered to adduce evidence for the defendants. Pemberton, seeing the gross indiscretion of this proceeding, started on his legs, pulled down his junior, and said—

“My Lord, we are contented that your Lordship should direct the jury.” *L. C. J.*: “No! no! I will hear Mr. Finch. The Bishops shall not say of me, that I would not hear their counsel.” *Pemberton, Sergt.*: “Pray, good my Lord, we stand mightily uneasy here, and so do the jury. Pray, dismiss us.”

But for Finch's foolish interruption, the anticipated acquittal would then have been recorded. At this moment it was announced that the Earl of Sunderland,¹ the Lord President, was coming into court to prove that the Bishops had, in his presence, presented the Petition to the King at Whitehall. *L. C. J.*: “Well, you see what comes of interruption.”

After Lord Sunderland's evidence, nothing remained except the question of *libel or no libel*? Pemberton, when on the bench, had concurred with the other judges in the doctrine that this was a question exclusively for the Court, and that the jury had nothing more to consider than whether, in point of fact, the writing alleged to be libellous had been composed and published by the defendant.² But, in spite of his own ruling, he insisted that, although the Bishops had been

1. Robert Spencer, Earl of Sunderland, was in his earlier career a supporter of the Exclusion Bill and of the Prince of Orange. But a singularly ambitious and self-seeking disposition made him never hesitate to change his side when it was likely to be unprosperous. He became a strong Tory, the leading minister of James II., and ultimately, though quite destitute of religious convictions, professed his conversion to Catholicism.

2. See *Rex v. Harris*, 7 St. Tr. 930,—the case in which, approving of Scroggs's law, he objected to whipping being part of the sentence.

CHAP. XX. proved to have composed and published the Petition, they were entitled to a verdict of *not guilty* from the jury.

Pemberton's speech to show that the Petition of the Bishops was not a libel.

"My Lords the Bishops," said he, "are here accused of a crime of a very heinous nature ; they are here branded and stigmatized by this information as if they were seditious libellers ; when, in truth, they have done no more than their duty, their duty to God, their duty to the King, and their duty to the Church. We insist that the kings of England have no power to suspend or dispense with the laws and statutes of this kingdom touching religion ; that is what we stand upon for our defence. And we say, that such a dispensing power with laws and statutes strikes at the very foundation of all the rights, liberties, and properties of the King's subjects whatsoever. If the King may suspend the laws of the land which concern our religion, I am sure there is no other law but he may suspend, and if the King may suspend all the laws of the kingdom, what a condition are all the subjects in for their lives, liberties, and properties !—all at mercy. The King's legal prerogatives are as much for the advantage of his subjects as of himself, and no man goes about to speak against them ; but, under pretence of legal prerogative, to extend this power of the King to the destruction of all his subjects, would be doing him no true service. These laws are in truth the great bulwark of the reformed religion ; they are, in truth, that which fenceth the Church of England, and we have no human protection besides. They were made upon a foresight of the mischief that had and might come by false religions in this kingdom—and were intended to keep them out—particularly to keep out the Romish religion, which is the very worst of all religions.¹ If this Declaration of Indulgence, against which the Bishops made a dutiful representation, should take effect, what would be the end of it ? All religions are encouraged, let them be what they will—Ranters, Quakers, and the like,—nay, even Popery, which was intended by these acts of Parliament to be kept out of this nation, as a religion no way tolerable, and not to be endured here. We say this farther, that my Lords the Bishops have the care of the

1. This must have been very distasteful to Mr. Justice Allibone, sitting before him on the bench, who, although a Papist, had been made a Judge of the King's Bench by virtue of this supposed dispensing power.

Church by their very function and offices, and are bound to take care to keep out all those false religions which are prohibited and designed to be kept out by the law; and, seeing that this Declaration was founded upon a mere pretended power which had been continually opposed and rejected in parliament, they could not comply with the King's commands to read it."

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XX.

He then went into an historical discussion respecting the *dispensing power*,¹ showing that as often as it

His discussion respecting the dispensing power.

1. The Dispensing Power was the name given to the royal prerogative by which the sovereign was enabled to exempt individuals from the operation of the penal laws. It is analogous to, and frequently confused with, the *Suspending Power*, by which a right was claimed to abrogate one or more statutes entirely. The origin of this idea may be traced to the ancient royal prerogative of pardoning individual offenders, from which, in an age of unscientific legislation, the transition to a power of previously annulling the penalties of a statute was easy. It found countenance in the clause *non obstante*, "any law to the contrary," introduced by the Popes into their Bulls in the thirteenth century. Henry III. imitated this clause in proclamations and grants, but not without protest; and in 1391 the Commons granted to Richard II. the right, with the consent of the Lords, of dispensing with the Statute of Provisors until the next Parliament, asserting, however, that this was a novelty, and should not be drawn into a precedent. The free use of the dispensing power alone made it possible to combine the retention of the Statutes of Provisors and *Pramunire* with friendly relations with the Papacy. The power was frequently disputed by Parliament, and although asserted by Henry V. in 1413, with regard to a law for expelling aliens from the kingdom, a statute passed in 1444, limiting the patents of sheriffs to a year, especially forbade the King to dispense with this provision, or to remit the penalties for breaking it. Under Henry VII. the dispensing power was frequently employed (the judges even deciding that the King might grant exceptions to the statute of 1444); but in this reign an important limitation was introduced, by an agreement among lawyers, that the King could not dispense with the penalties for an offence against the common law (*malum in se*), but only of one created by statute (*malum prohibitum*). In the reign of Henry VIII., however, the dispensing power became almost unlimited; it was true that the King could not dispense with future acts of Parliament, but he could "with things in future whereof he hath an inheritance." The ingenuity of lawyers failed to decide finally the limits of this prerogative, either during the Tudors or the first two Stuarts, by whom it was frequently exercised: Lord Coke, for instance, leaving the question as he found it by deciding that "no act of Parliament may bind the King from any prerogative which is inseparable from his person, so that he may not dispense with it by a *non obstante*." After the Restoration the dispensing power was revived by Charles II. for the new purpose of admitting Catholics to office, and in virtue of it he issued the Decla-

CHAP. XX. had been claimed in matters of religion it had been denied and abandoned. Coming to the last attempt in the reign of Charles II., he was proceeding,—“Afterwards, in 1672, the King was prevailed upon again to grant another dispensation somewhat larger——.” *L. C. J.*: “Brother Pemberton, I would not interrupt you, but we have heard of this over and over again already.” Pemberton, perceiving that the jury were strongly with him, dexterously said, “Then, since your Lordship is satisfied of all these things, as I presume you are (else I should have gone on), I have done, my Lord.”

Weight of
Pemberton
with the
jury as an
ex-Chief
Justice.

The other counsel exerted themselves with much boldness and vigor, but the victory which followed was chiefly to be ascribed to Pemberton, who, having reputably presided as Chief Justice of the Court, was regarded with far more respect by the jury than his infamous successor, Sir Robert Wright, and was still

ration of Indulgence. In 1673 the country party ventured to challenge the right, asserting, though on insufficient grounds, that it was confined to secular matters, and, by threatening to withhold supplies, induced the King to cancel the Declaration. James II., however, determined to use the power on a wholesale scale for the purpose of admitting Catholics to ecclesiastical as well as secular offices, and, after dismissing refractory judges and barristers, brought the question to an issue in Sir Edward Hale's case (1686). This was a collusive action—the plaintiff, Godden, being the defendant's servant, who claimed as an informer a penalty of 500*l.*, to which his master was liable for holding the command of a regiment without taking the sacrament. The defendant pleaded letters patent from the King, and the judges, with one exception, decided that the King might dispense with penal statutes in particular cases. This decision, by perpetuating a legal anomaly, is said by Hallam to have “sealed the condemnation of the House of Stuart.” Armed with this weapon, James immediately proceeded to admit Roman Catholic lords to the Privy Council, and to authorize clergymen to hold benefices. For these and other arbitrary acts he lost the crown, and the Bill of Rights abolished both the Suspending and Dispensing Power, declaring that “the pretended power of suspending laws and the execution of laws by regal authority without act of Parliament is illegal; and that the pretended power of dispensing with laws by regal authority without act of Parliament, as it hath been assumed and exercised of late, is illegal.”—*Low and Pulling's Dict. of Eng. Hist.*



THE SEVEN BISHOPS.
After an Old Print



supposed to be laying down the law with judicial authority.¹ CHAP.
XX.

It might have been expected that, having taken so bold a part during this trial, he would have signed the invitation to the Prince of Orange,² which was sent off immediately after; but his heart failed him. He was paralyzed by his scruples respecting the sin of rebellion and the perils to which he might subject himself if he should join in any unsuccessful attempt at resistance to arbitrary rule. He therefore continued to devote himself exclusively to his professional pursuits. Even after the Prince of Orange had landed he remained perfectly neutral, and he declined a seat in the Convention Parliament. His neutrality in the proceedings of the Revolution.

When William and Mary were on the throne, and new judges were to be appointed in the room of those who disgraced the bench at the end of the reign of James II., it was expected by many that Pemberton would have been restored along with Atkyns and John Powell, who had been removed for their honesty during the last two reigns; but, although his services in defending the Seven Bishops were duly appreciated, and it was acknowledged that, when compared with Jeffreys and Scroggs, he was a paragon of virtue, it could not be forgotten that from timidity, if not corruption, he had assisted the Government in their design to bring the Earl of Shaftesbury to the block, and that although he had wished to save Lord Russell he had allowed him to be sacrificed. Indeed, the attainder of this illustrious patriot being now reversed by act of parliament as unlawful, there would have Treatment of Pemberton after the Revolution.

1. 12 St. Tr. 183-433. My professional friends may be curious to know what his fees were on this occasion. From the attorney's bill it appears that he received five guineas retainer, twenty guineas with his brief, and three guineas for a consultation. Sir R. Sawyer and Mr. Finch refused to take any fee.

2. Afterwards William III.

CHAP.
XX.

May 1,
1689.

been much awkwardness in replacing on the bench the judge by whom it was pronounced. Therefore, when the members of the Cabinet produced their lists of twelve men to preside in the common-law courts in Westminster Hall, Pemberton's name was found in very few of them; and in the new judicial arrangement, which gave such general satisfaction, he was entirely passed over.

He is examined
before the
House of
Commons.

An inquiry being afterwards instituted into the manner in which judges had recently been tampered with and cashiered, he was examined before the House of Commons, but could or would give very little information on the subject. While others described very amusing scenes at Chiffinch's private room at Whitehall, where they had secret interviews with Charles and James, and were interrogated respecting the dispensing power, the King's prerogative to control the law by proclamations, and the judgment they were prepared to give in cases which were pending, they could get Pemberton to say nothing more than "I was removed out of my place without visible cause the first time; neither do I know the reason of my being removed from the King's Bench to the Common Pleas. I was never sent for to Whitehall nor to my Lord Chancellor's. The night before, my lord said nothing to me, but the next morning I had a *super-sedeas*."¹ Whether he had given offence by sulkiness I know not, but a resolution was now taken to treat him with great rigor.

Complaint
against
him of a
breach of
privilege
when he
was Chief
Justice of
the King's
Bench.

Mr. Topham, the Sergeant-at-arms of the House of Commons, presented a petition, setting forth "that several vexatious actions had been brought against him for executing the orders of the House when Sir Francis Pemberton was Chief Justice of the King's Bench, and that, although he had pleaded that he

acted under the authority of the House, he had been cast in damages and costs." The petition was referred to a select committee, who reported that the judgments given against the Sergeant-at-arms were illegal, and a violation of the privileges of Parliament. Sir Francis Pemberton was thereupon ordered to attend at the bar. The treatment which he experienced on this occasion has been severely condemned; but I must confess that his demeanor was not very straightforward or dignified. The Speaker having informed him that he was sent for to state the ground on which he had overruled the plea in *Jay v. Topham*,—instead of denying, like Holt, the right of either House of Parliament to interrogate him in this irregular manner, or frankly stating what had happened, he equivocated, and the following dialogue grieved his friends:

CHAP.
XX.

July 18,

Pemberton: "Sir, I know nothing of this action. I have been out of the court now six years, I cannot remember so many thousand actions as were brought at that time. But if you will let me know what the charge is, I do not doubt but I can give you a good account of it." *Speaker*: "A plea was pleaded that the defendant acted by the authority of this House, and such plea you overruled." *Pemberton*: "This is quite new to me, for I knew not what I was sent for." *Speaker*: "The House desires to know on what ground, in the case of *Jay v. Topham*, you overruled the defendant's plea." *Pemberton*: "I think he pleaded to the jurisdiction of the Court; and if he did, with submission the plea ought to have been overruled." *Speaker*: "The House doth require your reasons for maintaining this opinion." *Pemberton*: "I will give you my reasons as well as I can; but you cannot expect I should be furnished with such reasons now as I may state upon further consideration. I must premise that I do not think that your privileges are in question. There is no judge who understands himself but will allow the privileges of the House; they are the privileges of the nation, and we are all bound to maintain them as much as any member of the House. But the question is all *de modo*—whether the authority of the House is pleadable to the jurisdiction of the Court, or in bar? And, under favor, I have always

His dialogue with the Speaker.

CHAP. taken it that such a defence is not pleadable in abatement. The
XX. question is, whether this shall stop the Court, so that they cannot examine into the fact,—and see whether such a warrant was signed by the Speaker, as is alleged. Any man living might plead such a plea."

Time was given to inquire into the pleadings in *Jay v. Topham*, and the ex-Chief Justice was ordered to attend again.

July 19.
He seeks
to justify
his action
in the case.

When he next appeared, he insisted that the plea had been to the jurisdiction of the Court; and he added, "We did not question the legality of your orders, but we were to see whether the orders had been given, and whether they had been properly obeyed. If Mr. Topham arrested the plaintiff without any order, or imprisoned him till he paid a sum of money, damages ought to be awarded. If I was mistaken in this case, it was an error of my judgment. My design was to do justice."

The record is not to be found (as it ought to be) in the Treasury of the King's Bench, having been produced on this occasion at the bar of the House of Commons and not returned to the proper custody; but there is every reason to believe that the plea was substantially a plea in bar, and that it had been improperly overruled. Chief Justice Pemberton happened to be then oscillating towards the Government, which was highly incensed against the popular leaders, and entertained a strong desire to put down parliamentary privilege. The House of Commons (Maynard, Somers, and other learned and just men, being present) passed a resolution that Sir Francis Pemberton, in giving this judgment, had been guilty of a breach of privilege, and ordered him to be taken into custody. In consequence he was committed to Newgate, and he remained a close prisoner there till the 14th day of March, 1690—a period of eight months—

He is committed to Newgate.

when, the session being at last terminated by a prorogation, he was discharged. CHAP. XX.

Considering his great eminence as an advocate, the high judicial offices which he had filled, and the noble battle he had waged in the cause of freedom when defending the Seven Bishops, it is impossible not to commiserate his fate. But the leaders of the Convention Parliament have been too rashly blamed for the punishment inflicted upon him. Lord Ellenborough said, in *Burdett v. Abbott*, "It is surprising how a judge could have been questioned and committed to prison, by the House of Commons, for having given a judgment which no judge who ever sat in this place could differ from. It was after the Revolution—which makes such a commitment for such a cause a little alarming. It must be recollected that Lord Chief Justice Pemberton stood under the disadvantage at that period of having been one of the Judges who sat on the trial of Lord Russell. He was a man of eminent learning, and, being no favorite with either party at that time, for he was shortly after that trial removed from his situation, was probably an honest man."¹ And Lord Erskine,² having alluded in a debate in the House of Lords to this commitment of Lord Chief Justice Pemberton, exclaimed, with much vehemence, "If a similar attack were made upon my noble and learned friend (Lord Ellenborough) who sits next me, for the exercise of his legal jurisdiction, I would resist the usurpation with my strength, and bones, and blood."³ But there can be little doubt that Pemberton, who was ever deficient in moral courage, for the purpose of screening himself, misrepresented the plea, and that, however meritorious his services at other

Ellenborough's opinion of his punishment.

Erskine's opinion.

Pemberton deserving of his punishment.

1. 14 East, 104.

2. See Lives of the Lord Chancellors.

3. 16 Parl. Deb. 851.

CHAP.
XX.

March 14,
1690.
He again
practises
at the bar.
A. D. 1690
—1696.

times may have been, on this occasion he well deserved the punishment inflicted upon him.¹

On recovering his liberty, he once more returned to the bar; but now, enfeebled by age, and not supposed to have "the ear of the Court," he was very little employed. He had a beautiful villa near Highgate, where he spent the greatest part of his time in seclusion. So late, however, as the year 1696, he was one of the counsel for Sir John Fenwick,² and assisted in opposing the bill of attainder by which that unfortunate gentleman was put to death in a manner which would have been condemned in the worst days of the Stuarts.³ This was the last occasion of Sir Francis Pemberton ever appearing in public

1. See 2 Nels. Ab. 1243; Lord Campbell's Speeches, 206.

2. Sir John Fenwick (*d.* 1697). A zealous Tory member of the Parliament of 1685, who became, after the Revolution, one of the most ardent Jacobite conspirators. In 1695 he joined Charnock, Porter, and others in designs against the King, which ripened next year into the Assassination Plot. His fellow conspirator Porter informed the Government of the whole intrigue, and Sir John attempted to escape to France, but was arrested near Romney Marsh. He was committed to the Tower. In order to gain time, he offered to disclose all he knew touching the Jacobite plots. His artful confession, while silent about the real Jacobite plotters, contained a great deal of evidence—mostly true, no doubt—against Marlborough, Godolphin, Russell, and Shrewsbury, who had from time to time intrigued with the Court of St. Germain's. Furious at the charges brought against their party, the Whigs determined to pursue the subject. Fenwick was examined by William, but refused to make any disclosures. He had heard that his wife, Lady Mary Fenwick, had succeeded in getting Goodman—the only other witness against him—out of the country, and Porter's evidence remained unsupported. But the Whigs, not to be balked of their prey, brought in a bill of attainder against him, which the Commons passed by 186 to 156. The bill passed through its first stage in the Lords without a division. After a violent struggle, the second reading was carried by 73 to 53, and the third by only 68 votes to 61. On Jan. 28 he was executed. Hallam's opinion on the act of attainder is that "it did not, like some acts of attainder, inflict a punishment beyond the offence, but supplied the deficiency of legal evidence." Yet, allowing the substantial justice of the sentence, it is questionable whether it was not ill-advised to break from the rigid rules of law, especially for so second-rate a person as Fenwick.—*Low and Pulling's Dict. of Eng. Hist.*

3. 13 St. Tr. 537-738.

Soon after, he altogether withdrew from business, and the last three years of his life he entirely devoted to contemplation. He expired on the 10th of June, 1699, in the 74th year of his age, and was buried in Highgate church, where there still stands a monument erected to his memory, with the following inscription:

"M. S. venerabilis admodum viri D. Francisci Pemberton Eq. His episcopii, servientis ad legem, e sociis Interioris Templi, necnon sub serenissimo principe Carolo 2^o. Banci Regii ac Communis Capitalis Justiciarii, sacrae majestati a secretioribus consiliis; vir plane egregius, ad reipublicae pariter ac suorum dulce decus et presidium feliciter natus. Patre Radulpho in Agro Hertford. Generoso, ex antiqua Pembertonorum prosapia in Com. Palat. Lancastriae oriundo." ¹

With a little more firmness of principle, or moral courage, joined to his talents, acquirements, and opportunities, he might have been a great character in English history; but, while he perceived and approved the right course, and never entirely abandoned it, he not unfrequently deviated from it,—so that among his contemporaries he bore the condemned name of a "trimmer," and his reputation with posterity has been neither pure nor brilliant. The errors of his youth would have been easily forgiven after the noble amends which he made for them, but we cannot praise the excessive caution with which he ever conducted himself that he might not give offence to those in power; and although we feel pity rather than indignation when his virtue falters, he occasionally submitted to compliances, for the purpose of winning and retaining office, which utterly deprives him of our esteem. If any thing could have made him appear a respectable judge, it would have been a comparison with the four Chief Justices who succeeded him.²

1. Lysons' Environs, p. 68; Clutterbuck's Herts, ii. 449. He left several sons behind him; and his descendants were seated at Trumpington, near Cambridge, till the beginning of the present century.

2. Chauncy, the historian of Hertfordshire, is the only author who speaks of his contemporary Sir Francis Pemberton with unmixed com-

CHAP. XX. mendment. His other biographers, with whatever party they are connected, almost invariably qualify the encomiums they are compelled to utter with some expressions of depreciation. One says that he was a great lawyer, but that he had so towering an opinion of his own sense and wisdom that he made more law than he declared. Another, while acknowledging that he was an excellent judge, asserts that his passion for preferment led him sometimes to do wrong. The various incidents of his career are so tinted by the different prejudices of the writers, whether Whig or Tory, that, not receiving the entire approbation of either party, the natural inference to an unprejudiced mind is, that he acted independently of both. That he was "damned with faint praise" receives its explanation in Burnet's admission that "he was not wholly for the Court."—*Foss's Lives of the Judges.*

CHAPTER XXI.

LIFE OF LORD CHIEF JUSTICE SAUNDERS.

THERE never was a more flagrant abuse of the prerogative of the Crown than the appointment of a Chief Justice of the King's Bench for the undisguised purpose of giving judgment for the destruction of the charters of the City of London, as a step to the establishment of despotism over the land. Sir Edmund Saunders accomplished this task effectually, and would, without scruple or remorse, have given any other illegal judgment required of him by a corrupt Government. Yet I feel inclined to treat his failings with lenience, and those who become acquainted with his character are apt to have a lurking kindness for him. From the disadvantages of his birth and breeding, he had little moral discipline; and he not only showed wonderful talents, but very amiable social qualities. His rise was most extraordinary, and he may be considered as our *legal Whittington*.

"He was at first," says Roger North, "no better than a poor beggar-boy, if not a parish foundling without known parents or relations." There can be no doubt that, when a boy, he was discovered wandering about the streets of London in the most destitute condition—penniless, friendless—without having learned any trade, without having received any education. But although his parentage was unknown to the contemporaries with whom he lived when he had advanced himself in the world, recent inquiries have ascertained that he was born in the parish of Barnwood, close by

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Kind feeling among lawyers for Sir Edmund Saunders in spite of his profanity.

Qu. whether he was a foundling?

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XXI.His first
appearance
in London.

the city of Gloucester; that his father, who was above the lowest rank of life, died when he was an infant, and that his mother took for her second husband a man of the name of Gregory, to whom she bore several children. We know nothing more respecting him, with certainty, till he presented himself in the metropolis; and we are left to imagine that he might have been driven to roam abroad for subsistence, by reason of his mother's cottage being levelled to the ground during the siege of Gloucester; or that, being hardly used by his stepfather, he had run away, and had accompanied the broad-wheeled wagon to London, where he had heard that riches and plenty abounded.

How he
learned to
write.

The little fugitive found shelter in Clement's Inn,¹ where "he lived by obsequiousness, and courting the attorneys' clerks for scraps."² He began as an errand-boy, and his remarkable diligence and obliging disposition created a general interest in his favor. Expressing an eager ambition to learn to write, one of the attorneys of the Inn got a board knocked up at a window on the top of a staircase. This was his desk, and, sitting here, he not only learned the *running hand* of the time, but *court hand*, *black letter*, and *engrossing*, and made himself an "expert entering clerk." In winter, while at work, he covered his shoulders with a blanket, tied hay-bands round his legs, and made the blood circulate through his fingers by rubbing them when they grew stiff. His next step was to copy deeds and law papers, at so much a folio or page,—by which he was enabled to procure for himself wholesome food and decent clothes. Meanwhile he not only picked up a knowledge of Norman French, and law Latin, but, by borrowing books, acquired a deep in-

His legal
education.

1. Clement's Inn was one of the nine Inns of Chancery in London, so named from its proximity to the church of St. Clement Danes and St. Clement's Well.—*Wheeler's Familiar Allusions*.

2. Life of Guilford, ii. 125.

sight into the principles of conveyancing and special pleading. By and by the friends he had acquired enabled him to take a small chamber, to furnish it, and to begin business on his own account as a conveyancer and special pleader. But it was in the latter department that he took greatest delight, and was the most skilful—inasmuch that he gained the reputation of being familiarly acquainted with all its mysteries; and although the order of “special pleaders under the bar” was not established till many years after, he was much resorted to by attorneys who wished by a sham plea to get over the term, or by a subtle replication to take an undue advantage of the defendant.

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His skill as
a special
pleader.

It has been untruly said of him, as of Jeffreys, that he began to practise as a barrister without having been ever called to the bar. In truth, the attorneys who consulted him having observed to him that they should like to have his assistance to maintain in court the astute devices which he recommended, and which duller men did not comprehend, or were ashamed of, he, rather unwillingly, listened to their suggestion that he should be entered of an Inn of Court, for he never cared much for great profits or high offices: and, having money enough to buy beer and tobacco, the only luxuries in which he wished to indulge, he would have preferred to continue the huggermugger life which he now led. He was domesticated in the family of a tailor in Butcher Row,¹ near Temple Bar,² and

1. This was a very narrow dirty lane, which was swept away when the improvements were made between St. Clement's Church and Temple Bar, about forty years ago.

2. Temple Bar was rebuilt by Sir Christopher Wren in 1670-72, soon after the Great Fire had swept away 80 London churches, 4 out of the 7 City gates, 460 streets, and 13,200 houses, and had destroyed 15 of the 26 wards, and laid waste 436 acres of buildings, from the Tower eastward, to the Inner Temple westward. . . . The Bar, after having been for many years a great obstruction to the traffic, was removed in the winter of 1877-78, while the new Law Courts were in process of erection. The Bar was of Portland stone, which London smoke alternately blackens and cal-

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He enters
the Middle
Temple.
July 4,
1660.

was supposed to be rather too intimate with the mistress of the house. However, without giving up his lodging here, to which he resolutely stuck till he was made Lord Chief Justice of England, he was prevailed upon to enter as a member of the Middle Temple. Accordingly, on the 4th of July, 1660, he was admitted there by the description of "Mr. Edmund Saunders, of the county of the city of Gloucester, gentleman." The omission to mention the name of his father might have given rise to the report that he was a foundling; but a statement of parentage on such occasions, though usual, was not absolutely required, as it now is.

He is called
to the bar.
Nov. 15,
1664.

He henceforth attended "moots," and excited great admiration by his readiness in putting cases and taking off objections. By his extraordinary good-humor and joviality, he likewise stood high in the favor of his brother Templars. The term of study was then seven years, liable to be abridged on proof of proficiency; and the benchers of the Middle Temple had the discernment and the liberality to call Saunders to the bar when his name had been on their books little more than four years.

His rapid
progress.

We have a striking proof of the rapidity with which he rushed into full business. He compiled Reports of the decisions of the Court of King's Bench, beginning with Michaelmas Term, 18 Charles II., A.D.

cines; and each façade had four Corinthian pilasters, an entablature, and an arched pediment. On the west (Strand) side, in two niches, stood, as eternal sentries, Charles I. and Charles II. in Roman costume. Charles I. long ago lost his baton, as he once deliberately lost his head. Over the keystone of the central arch there used to be the royal arms. On the east side were James I. and Elizabeth. . . . The shadow of every monarch and popular hero since Charles II.'s time has rested for at least a passing moment at the old gateway. Queen Anne passed here to return thanks at St. Paul's for the victory at Blenheim. Here Marlborough's coach ominously broke down in 1714, when he returned in triumph from his voluntary exile. On the 9th November, 1837, the accession of Queen Victoria, Sir Peter Laurie, picturesque in scarlet gown, Spanish hat, and black feathers, presented the City sword to the Queen at Temple Bar.—*Thornbury's Old and New London*, vol. i. p. 24.

1666, when he had only been two years at the bar. CHAP. XXI.
 These he continued till Easter Term, 24 Charles II., His Reports, A.D. 1694, —1672.
 A.D. 1672. They contain all the cases of the slightest importance which came before the Court during that period; and he was counsel in every one of them.

His "hold of business" appears the more wonderful when we consider that his *liaison* with the tailor's wife was well known, and might have been expected to damage him even in those profligate times; and that he occasionally indulged to great excess in drinking, so that he must often have come into court very little acquainted with his "breviat," and must have trusted to his quickness in finding out the questions to be argued, and to his storehouse of learning for the apposite authorities.

But, when we peruse his "Reports," the mystery Their excellence. is solved. There is no such treat for a common lawyer. Lord Mansfield called him the "Terence of reporters," and he certainly supports the forensic dialogue with exquisite art, displaying infinite skill himself in the points which he makes, and the manner in which he defends them; doing ample justice, at the same time, to the ingenuity and learning of his antagonist. Considering the barbarous dialect in which he wrote (for the Norman French was restored with Charles II.), it is marvellous to observe what a clear, terse, and epigrammatic style he uses on the most abstruse juridical topics.

He labored under the imputation of being fond of sharp practice, and he was several times rebuked by the Court for being "*trop subtile*," or "going too near the wind;" but he was said by his admirers to be fond of his *craft* only *in meliori sensu*, or in the good sense of the word, and that, in entrapping the opposite party, he was actuated by a love of fun rather than a

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love of fraud.¹ Thus is he characterized, as a practitioner, by Roger North :

A.D. 1672
—1680.
His character as a practitioner.

“Wit and repartee in an affected rusticity were natural to him. He was ever ready, and never at a loss, and none came so near as he to be a match for Sergeant Maynard.² His great dexterity was in the art of special pleading, and he would lay snares that often caught his superiors, who were not aware of his traps. And he was so fond of success for his clients, that, rather than fail, he would set the Court hard with a trick : for which he met sometimes with a reprimand, which he would wittily ward off, so that no one was much offended with him. But Hale could not bear his irregularity of life ; and for that, and suspicion of his tricks, used to bear hard upon him in the court. But no ill usage from the bench was too hard for his hold of business, being such as scarce any could do but himself.”³

He did not, like Scroggs and Jeffreys, intrigue for advancement. He neither sought favor with the popular leaders in the City, nor tried to be introduced into

1. I knew such a man in my youth. Having demurred four times successively to a very faulty declaration, assigning only one blunder for cause of demurrer each time, the author of the declaration sent him a challenge as for a personal insult ; when he merely returned for answer, “Dear Tom, I fight only in *Banco Regis*. Why should you not suppose that I might be as dull as yourself, and that it took me some time to find out the blunders which had escaped you ? When I came to one which was decisive, there I stopped, presuming that what followed must be all right. Your loving friend, E. L.”

2. Sir John Maynard, an English statesman and lawyer, who, after having studied at Exeter College, Oxford, entered at the Middle Temple, was in due course called to the bar, and distinguished himself as one of the prosecutors of Strafford and Laud ; but afterwards opposed the violent proceedings of the army, and the usurpation of Cromwell, for which he was twice sent to the Tower. After the Restoration he was knighted, but refused the honor of being a judge. At the Revolution he displayed great talents in the conference between the Lords and Commons, on the question of the abdication of the throne by James II., and warmly advocated that measure. When William III., in allusion to Sergeant Maynard’s great age, remarked that he must have outlived all the lawyers of his time, Sir John happily replied, “Yes ; and if your Highness had not come over to our assistance, I should have outlived the law too.” He was appointed one of the commissioners of the Great Seal in 1689. Born about 1602, died 1690.—*Bacon’s Biog. Dict.*

3. Life of Guilford, ii. 127.

Chiffinch's "spie office" at Whitehall. "In no time did he lean to faction, but did his business without offence to any. He put off officious talk of government and politics with jests, and so made his wit a catholicon or shield to cover all his weak places and infirmities."¹ He was in the habit of laughing both at Cavaliers and Roundheads; and, though nothing of a Puritan himself, the semi-popish high-churchmen were often the objects of his satire.

His professional, or rather his special-pleading, reputation forced on him the advancement which he did not covet. Towards the end of the reign of Charles II., when the courts of justice were turned into instruments of tyranny (or, as it was mildly said, "the Court fell into a steady course of using the law against all kinds of offenders"), Saunders had a general retainer from the Crown, and was specially employed in drawing indictments against Whigs, and *quo warrantos* against Whiggish corporations.² In Crown cases he really considered the King as his client, and was as eager to gain the day for him, by all sorts of manœuvres, as he had ever been for a roguish Clement's Inn attorney. He it was that suggested the mode of proceeding against Lord Shaftesbury for high treason: on his recommendation the experiment was made of examining the witnesses before the grand jury in open court,—and he suggested the subtlety that "the usual secrecy observed being for the King's benefit, it might be waived by the King at his pleasure." When the important day arrived, he himself interrogated very artfully Mr. Blathwayt, the clerk of the Council, who was called to produce the papers which

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He is employed by the Government against the Whigs.

He suggests the mode of proceeding against Shaftesbury.
A.D. 1681.

1. Life of Guilford, ii. 125.

2. He had discontinued his Reports, partly from want of leisure, and partly from disliking to report the decisions of such judges as Raynsford and Scroggs.

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had been seized at Lord Shaftesbury's house¹ in Aldersgate Street,² and gave a treasonable tinge to all that passed. The IGNORAMUS of his indictment must have been a heavy disappointment to him; but the effort

1. On the right of the street, conspicuous from its front by eight pillars, is a fine old house built by Inigo Jones, formerly called Thanet House, from the Tultons, Earls of Thanet, but which has been known as *Shaftesbury House* since it was inhabited by the first Earl of Shaftesbury, Anthony Ashley-Cooper, the "Achitophel" of Dryden, so graphically described by him:

"For close designs and crooked counsels fit,
Sagacious, bold, and turbulent of wit;
Restless, unfixed in principles and place,
In power unpleased, impatient of disgrace;
A fiery soul, which, working out its way,
Fretted the pygmy body to decay,
And o'er-informed the tenement of clay.
A daring pilot in extremity,
Pleased with the danger when the waves went high,
He sought the storms; but, for a calm unfit,
Would steer too nigh the sands to boast his wit."

Lord Shaftesbury chose this house as a residence that he might the better influence the minds of the citizens, of whom he boasted that he "could raise ten thousand brisk boys by the holding up of his finger." His animosity to the Duke of York obliged his retirement in 1683 to Holland, where he died. The house, as Maitland says, is "a most delightful fine residence, which deserves a much better situation, and greater care to preserve it from the injuries of time."—*Hare's Walks in London*, book i. p. 264.

2. *Aldersgate Street*, so called from the northern gate, one of the three original gates of Anglo-Norman London. Some derive its name from the Saxon Aldrich, its supposed founder; others, including Stow, from the alder-trees which grew around it. The gate (removed in 1761) as restored after the Fire was rather like Temple Bar, with the addition of side towers, and was surmounted by a figure of James I. It was inscribed with the words of Jeremiah—"Then shall enter into the gates of this city kings and princes, sitting upon the throne of David, riding in chariots and on horses, they and their princes, the men of Judah, and the inhabitants of Jerusalem, and this city shall remain for ever." The rooms over the gate were occupied by the famous printer John Day, who printed the folio Bible, dedicated to Edward VI., in 1549, as well as the works of Roger Ascham, Latimer's Sermons, and Foxe's "Book of Martyrs." In the frontispiece of one of his books he is represented in a room into which the sun is shining, arousing his sleeping apprentices with a whip, and the words, "Arise, for it is day." The whole of this neighborhood teems with associations of Milton, who lived in "a pretty garden-house" in Aldersgate Street after his removal from St. Bride's churchyard.—*Hare's Walks in London*, book i. p. 258.

which he had made gave high satisfaction to the King, who knighted him on the occasion, and from that time looked forward to him as a worthy Chief Justice.¹

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He pleases
the King
and is
knighted.

Upon the dissolution of the Oxford Parliament and the rout of the Whig party, it being resolved to hang Fitzharris, Saunders argued with uncommon zeal against the prisoner's plea that there was an impeachment depending for the same offence; and concluded his legal argument in a manner which seems to us very inconsistent with the calmness of a dry legal argument: "Let him plead *guilty* or *not guilty*: I rather hope that he is *not guilty* than that he is *guilty*: but if he be *guilty*, it is the most horrid venomous treason ever spread abroad in any age. And for that reason your Lordships will not give countenance to any delay."²

His argu-
ment
against
Fitzharris.

I find him several times retained as counsel against the Crown; but upon these occasions the Government wished for an acquittal. He defended the persons who were prosecuted for attempting to throw discredit on the Popish Plot;³ he was assigned as one of the counsel for Lord Viscount Stafford;⁴ and he supported the application made by the Earl of Danby to be discharged out of custody.⁵ On this last occasion he got into a violent altercation with Lord Chief Justice Pemberton. The report says that "Mr. Saunders had hardly begun to speak when the Lord Chief Justice Pemberton did reprimand the said Mr. Saunders for having offered to impose upon the Court. To all which Mr. Saunders replied, that he humbly begged his Lordship's pardon, but he did believe that the rest of his brethren understood the matter as he did." The

His quarrel
with Chief
Justice
Pemberton.

1. 8 St. Tr. 770.
2. 8 St. Tr. 271.
3. 7 St. Tr. 906.
4. 7 St. Tr. 1242.
5. 11 St. Tr. 831.

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Earl of Danby supported this statement, and Saunders had a complete triumph over the Chief Justice.¹

Pemberton was soon removed from the office of Chief Justice of the King's Bench, and Saunders sat in his place.

A.D. 1682.
History of
the great
London
QUO WARRANTO.

In spite of the victory which the King had gained over the Whigs at the dissolution of his last parliament, he found one obstacle remain to the perpetuation of his despotic sway in the franchises of the City of London. The citizens (among whom were then included all the great merchants, and some of the nobility and gentry) were still empowered to elect their own magistrates; they were entitled to hold public meetings; and they could rely upon the pure administration of justice by impartial juries, should they be prosecuted by the Government. The Attorney and Solicitor General, being consulted, acknowledged that it passed their skill to find a remedy; but, a case being laid before Saunders, he advised that something should be discovered which might be set up as a forfeiture of the City charters, and that a QUO WARRANTO should be brought against the citizens, calling upon them to show by what authority they presumed to act as a corporation. Nothing bearing the color even of irregularity could be suggested against them except that, on the rebuilding and enlarging of the markets after the great fire, a by-law had been made, requiring those who exposed cattle and goods to contribute to the expense of the improvements by the payment of a small toll; and that the Lord Mayor, Aldermen, and Commonalty of the City had, in the year 1679, presented a petition to the King lamenting the prorogation of parliament in the following terms: "Your petitioners are greatly surprised at the late prorogation, whereby the prosecution of the

1. 11 St. Tr. §31.

public justice of the kingdom, and the making of necessary provisions for the preservation of your Majesty and your Protestant subjects, have received interruption."

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XXI.
History of
the great
London
QUO WARRANTO,
continued.

Saunders allowed that these grounds of forfeiture were rather scanty, but undertook to make out the BY-LAW to be the usurpation of a power to impose taxes without authority of Parliament, and the PETITION a seditious interference with the just prerogative of the Crown.

Accordingly, the QUO WARRANTO was sued out, and, to the plea setting forth the charters under which the citizens of London exercised their privileges as a corporation, he drew an ingenious replication, averring that the citizens had forfeited their charters by usurping a power to impose taxes without authority of Parliament, and by seditiously interfering with the just prerogative of the Crown. The written pleadings ended in a demurrer, by which the sufficiency of the replication was referred, as a question of law, to the judgment of the Court of King's Bench.

Saunders was preparing himself to argue the case as counsel for the Crown, when, to his utter astonishment, he received a letter from the Lord Keeper announcing his Majesty's pleasure that he should be Chief Justice. He not only never had intrigued for the office, but his appointment to it had never entered his imagination; and he declared, probably with sincerity, that he would much sooner have remained at the bar, as he doubted whether he could continue to live with the tailor in Butcher Row, and he was afraid that all his favorite habits would be dislocated. This arrangement must have been suggested by cunning lawyers, who were distrustful of Pemberton, and were sure that Saunders might be relied upon. But Roger North ascribes it to Charles himself; not attempting,

Saunders
made
Chief Jus-
tice of the
King's
Bench.

CHAP. however, to disguise the corrupt motive for it. "The
XXI. King," says he, "observing him to be of a free disposition, loyal, friendly, and without greediness or guile, thought of him to be Chief Justice of the King's Bench *at that nice time*. And the ministry could not but approve of it. *So great a weight was then at stake as could not be trusted to men of doubtful principles, or such as anything might tempt to desert them.*"¹

His installation,
Jan. 23,
1683.

On the 23d of January, being the first day of Hilary Term, 1683, Sir Edmund Saunders appeared at the bar of the Court of Chancery, in obedience to a writ requiring him to take upon himself the degree of Sergeant-at-law; and distributed the usual number of gold rings, of the accustomed weight and fineness, with the courtly motto "PRINCIPI SIC PLACUIT."² He then had his coil put on, and proceeded to the bar of the Common Pleas, where he went through the form of pleading a sham cause as a Sergeant. Next he was marched to the bar of the King's Bench, where he saw the Lord Keeper on the bench, who made him a flowery oration, pretending "that Sir Francis Pemberton, at his own request, had been allowed to resign the office of Chief Justice of that Court, and that his Majesty, looking only to the good of his subjects, had selected as a successor him who was allowed to be the fittest, not only for learning, but for every other qualification." The new Chief Justice, who often expressed a sincere dislike of *palaver*, contented himself with repeating the motto on his rings, "PRINCIPI SIC PLACUIT;" and, having taken the oaths, was placed on the bench, and at once began the business of the Court.³

Hearing of
the QUO
WARRANTO.

In a few days afterwards came on to be argued the great case of *The King v. The Mayor and Commonalty of*

1. Life of Guilford, ii. 129.

2. "Thus it pleased the sovereign."

3. 2 Shower, 264; Sir Thomas Raymond, 478.



LORD SOMERS.
AFTER SIR GODFREY KNELLER.



the City of London. Finch, the Solicitor General, appeared for the Crown; and Treby, the Recorder of London, for the defendants. The former was heard very favorably; but the latter having contended that, even if the By-law and the Petition were illegal, they must be considered only as the acts of the individuals who had concurred in them, and could not affect the privileges of the body corporate—an *ens legis*, without a soul, and without the capacity of sinning,—Lord Chief Justice Saunders exclaimed—

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“According to your notion, never was one corporate act done by them: certainly, whatsoever the Common Council does, binds the whole; otherwise it is impossible for you to do any corporate act, for you never do, and never can, convene all the citizens. Then you say your Petition is no reflection on the King, but it says that by the prorogation public justice was interrupted. If so, by whom was public justice interrupted? Why, by the King! And is it no reflection on the King, that, instead of distributing justice to his people, he prevents them from obtaining justice? You must allow that the accusation is either true or false. But, supposing it true that the King did amiss in proroguing the Parliament, the Common Council of London neither by charter nor prescription had any right to control him. If the matter were not true (as it is not), the Petition is a mere calumny. But if you could justify the presenting of the Petition, how can you justify the printing of it, whereby the Mayor, Aldermen, and citizens of London do let all the nation know that the King, by the prorogation of Parliament, hath given the public justice of the nation an interruption? Pray, by what law, or custom, or charter, is this privilege of censure exercised? You stand forth as ‘chartered libertines.’ As for the *impeccability* of the corporation, and your doctrine that nothing which it does can affect its being, strange would be the result if that which the corporation does is not the act of the corporation, and if, the act being unlawful and wicked, the corporation shall be punishable. I tell you I deliver no opinion now,—I only mention some points worthy of consideration. Let the case be argued again next term.”

In the ensuing term the case was again argued by

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XXI.
The case
again
argued in
the ensu-
ing term,
and judg-
ment de-
ferred.

Sawyer, the Attorney General, for the Crown, and Pollexfen for the City,—when Lord Chief Justice Saunders said, “ We shall take time to be advised of our opinion, but I cannot help now saying what a grievous thing it would be if a corporation cannot be forfeited or dissolved for any crime whatsoever. Then it is plain that you oust the King of his *Quo Warranto*, and that, as many corporations as there are, so many independent commonwealths are established in England. We shall look into the precedents, and give judgment next term.”

June 12.
Saunders’s
last illness.

When next term arrived, the Lord Chief Justice Saunders was on his death-bed. His course of life was so different from what it had been, and his diet and exercise so changed, that the constitution of his body could not sustain it, and he fell into an apoplexy and palsy, from which he never recovered.¹ But, before his illness, he had secured the votes of his brethren.

Judgment
in the *QUO*
WARRANTO.

The judgment of the Court was pronounced by Mr. Justice Jones, the senior Puisne Judge, who said,—

“ Several times have we met and had conference about this matter, and we have waited on my Lord Saunders during his sickness often ; and, upon deliberation, we are unanimously of opinion that a corporation aggregate, such as the City of London, may be forfeited and seised into the King’s hands, on a breach of the trust reposed in it for the good government of the King’s subjects ;—that to assume the power of making by-laws to levy money, is a just cause of forfeiture ;—and that the Petition in the pleadings mentioned is so scandalous to the King and his government, that it is a just cause of forfeiture. Therefore, this Court doth award that the liberties and franchises of the City of London be seised into the King’s hands.”

To what
this judg-
ment led.

This judgment was considered a prodigious triumph, but it led directly to the misgovernment which in little more than five years brought about the Revo-

1. Life of Guilford, ii. 129.

lution and the establishment of a new dynasty. To guard against similar attempts in all time to come, the charters, liberties, and customs of the City of London were then confirmed, and for ever established, by act of parliament.¹

Saunders was Chief Justice so short a time, and this was so completely occupied with the great QUO WARRANTO Case, that I have little more to say of him as a Judge. We are told that "while he sat in the Court of King's Bench he gave the rule to the general satisfaction of the lawyers."²

We have the account of only one trial before him at *nisi prius*,—that of *Pilkington, Lord Grey de Werke, and others*, for a riot. Before the City of London was taken by a regular siege, an attempt had been made upon it by a *coup de main*. The scheme was to prevent the regular election of sheriffs, and to force upon the City the two Court candidates, who had only a small minority of electors in their favor. In spite of violence used on their behalf, the poll was going in favor of the liberal candidates, when the Lord Mayor, who had been gained over by the Government, pretended to adjourn the election to a future day. The existing sheriffs, who were the proper officers to preside, continued the poll, and declared the liberal candidates duly elected. Nevertheless, the Court candidates were sworn in as sheriffs, and those who had insisted on continuing the election after the pretended adjournment by the Lord Mayor were prosecuted for a riot. They pleaded *not guilty*, and, a jury to try them having been summoned by the new sheriffs, the trial came on at Guildhall before Lord Chief Justice Saunders. He was then much enfeebled in health, and the excitement produced by it was supposed to have been the cause

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Saunders's
conduct at
the trial of
Rex v.
Pilkington
et al.

1. 2 Shower, 275 ; 3 St. Tr. 1039-1358.

2. Life of Guilford, ii. 129.

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Trial of
Rex v.
Pilkington
et al., con-
tinued.

of the fatal malady by which he was struck a few days after.

The jury being called, the counsel for the defendants put in a *challenge to the array*, on the ground that the supposed sheriffs, by whom the jury had been returned, were not the lawful sheriffs of the City of London, and had an interest in the question:

L. C. J. Saunders: "Gentlemen, I am sorry you should have so bad an opinion of me, and think me so little of a lawyer, as not to know that this is but trifling, and has nothing in it. Pray, gentlemen, do not put these things upon me." *Mr. Thompson*: "I desire it may be read, my Lord." *L. C. J. Saunders*: "You would not have done this before another judge; you would not have done it if Sir Matthew Hale had been here. There is no law in it." *Mr. Thompson*: "We desire it may be read." *L. C. J. Saunders*: "This is only to tickle the people." The challenge, however, was read. *Jeffreys*: "Here's a tale of a tub indeed!" *L. C. J. Saunders*: "Aye, it is nothing else, and I wonder that lawyers should put such a thing upon me." *Mr. Thompson*: "My Lord, we desire this challenge should be allowed." *L. C. J. Saunders*: "No, indeed, won't I. There is no color for it." *Mr. Thompson*: "My Lord, is the fact true or false? If it be insufficient in point of law, let them demur." *Jeffreys*: "'Robin Hood on Greendale stood'!!! I pray for the King that it may be overruled." *Mr. Thompson*: "My Lord, I say where a sheriff is interested in point of title, he is no person in law to return a jury. The very title to the office is here in question." *L. C. J. Saunders*: "Mr. Thompson, methinks you have found out an invention, that the King should never have power to try it, even so long as the world stands. Who would you have the process go to?" *Mr. Thompson*: "To the coroner." *L. C. J. Saunders*: "My speech is but bad; let me know what objection is made, and if I can but retain it in my memory, I don't question but to give you satisfaction. The sheriffs who returned the jury are sheriffs *de facto*, and their title cannot thus be inquired into. Wherever the defendant thinks it may go hard with him, are we to have a trial whether the sheriffs be sheriffs or no? What you are doing may be done in every cause that may be trying." *Mr. Thompson*: "My Lord, we pray a bill of exceptions."

Jeffreys: "This discourse is only for discourse' sake. Swear the jury." *L. C. J. Saunders*: "Aye, swear the jury."

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Trial of
Rex v.
Pilkington
et al., con-
tinued.

So far, he was right in point of law; but, when the trial proceeded upon the merits, to suit the purposes of the Government and to obtain a conviction he laid down doctrines which he must well have known to be indefensible respecting the power of the Lord Mayor to interrupt the poll by an adjournment, and the supposed offence of the electors in still continuing the election, they believing that they were exercising a lawful franchise. Finally, in summing up to the jury, he observed,—

"But they pretend that the sheriffs were the men, and that the Lord Mayor was nobody; that shows that it was somewhat of the Commonwealth seed that was like to grow up among the good corn." [Here, the report says, *the people hummed and interrupted my Lord*. He thus continued.] "Pray, gentlemen, that is a very indecent thing; you put an indignity upon the King. Pray, gentlemen, forbear; such demeanor does not become a court of justice. When things were topsy-turvy I can't tell what was done, and I would be loath to have it raked up now. These defendants tell you that they believed they were acting according to law, but ignorance of the law is now no excuse, and you will consider whether they did not in a tumultuary way make a riot to set up a magistracy by the power of the people? Gentlemen, it hath been a long trial, and it may be I have not taken it well; my memory is bad, and I am but weak: I don't question but your memories are better than mine. Consider your verdict, and find as many guilty as you think fit."

The jury having been carefully packed, the defendants were all found guilty, and they were heavily fined; but, after the Revolution, this judgment was reversed by the legislature.¹

During Lord Chief Justice Saunders's last illness Saunders's
hopeless the Rye House Plot was discovered, and it was a a condition,

1. 9 St. Tr. 187-298.

CHAP. heavy disappointment to the Government that no
XXI. further aid could be expected from him in the measures still contemplated for cutting off the Whig leaders and depressing the Whig party. His hopeless condition being ascertained, he was deserted and neglected by all his Whitehall patrons, who had lately been so attentive to him, and he received kindness only from humble dependants and some young lawyers, who, notwithstanding all his faults, had been attached to him from his singular good-humor.

His death. A few minutes after ten o'clock in the forenoon of
June 19, Tuesday, the 19th of June, 1683, he expired in a house
1683. at Parson's Green, to which he had unwillingly transferred himself from Butcher Row when promoted to be Chief Justice.¹ His exact age was not known, but he was not supposed to be much turned of fifty, although a stranger who saw him for the first time would have taken him to be considerably more advanced in life. Of his appearance, his manners, and his habits, we have, from one who knew him intimately, the following graphic account, which it would be a sin to abridge or to alter :

His ap- "As to his person, he was very corpulent and beastly ;—a
pearance, mere lump of morbid flesh. He used to say '*by his troggs* (such
manners, an humorous way of talking he affected) *none could say he*
and habits. *wanted issue of his body, for he had nine in his back.*' He was a fetid mass that offended his neighbors at the bar in the sharpest degree. Those whose ill fortune it was to stand near him were confessors, and in summer-time almost martyrs. This hateful decay of his carcass came upon him by continual sottishness ; for, to say nothing of brandy, he was seldom without a pot of ale at his nose, or near him. That exercise was all he used ; the rest of his life was sitting at his desk or piping at home ; and that *home* was a tailor's house, in Butcher Row, called his lodging, and the man's wife was his nurse or worse : but by virtue of his money, of which he made little account, though he got a

1. 3 Mod. 25.

great deal, he soon became master of the family ; and, being no changeling, he never removed, but was true to his friends and they to him to the last hour of his life. With all this, he had a goodness of nature and disposition in so great a degree that he may be deservedly styled a *philanthrope*. He was a very *Silenus* to the boys, as in this place I may term the students of the law, to make them merry when ever they had a mind to it. He had nothing of rigid or austere in him. If any near him at the bar grumbled at his stench, he ever converted the complaint into content and laughing with the abundance of his wit. As to his ordinary dealing, he was as honest as the driven snow was white ; and why not, having no regard for money or desire to be rich ? And for good nature and condescension, there was not his fellow. I have seen him for hours and half hours together before the court sat, stand at the bar, with an audience of students over against him, putting of cases, and debating so as suited their capacities and encouraged their industry. And so in the Temple, he seldom moved without a parcel of youths hanging about him, and he merry and jesting with them. Once, after he was in the King's business, he dined with the Lord Keeper, and there he showed another qualification he had acquired, and that was to play jigs upon an harpsichord, having taught himself with the opportunity of an old virginal of his landlady's ; but in such a manner, not for defect but figure, as to see him was a jest."²

I have not to give a relation of peers, baronets, or knights, descended from this Chief Justice, as he was never married, but he has nevertheless contributed to the "Grandeur of the Law" by his *REPORTS*, which are so entertaining as well as instructive that they have instilled into many a taste for juridical study, notwithstanding its imagined dryness, proving our science to be—

1. *Silenus* was the son of *Pan*, chief of the *sileni* or older satyrs. *Silenus* was the foster-father of *Bacchus*, the wine-god, and is described as a jovial old toper, with bald head, pug-nose, and pimply face.

"Old *Silenus*, bloated, drunken,

Led by his inebriate satyrs." (Longfellow.)

—*Brewer's Reader's Handbook*.

2. *Life of Guilford*, ii. 126-129 ; and see *Granger*, iii. 367.

CHAP.
XXI.
North's description
of his appearance,
manners,
and habits,
continued.

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XXI.

‘Not harsh and crabbed, as dull fools suppose,
But—a perpetual feast of nectar’d sweets,
Where no crude surfeit reigns.”¹

His will.

Notwithstanding his carelessness about money, he left considerable property behind him. This he disposed of by a will, dated 23d of August, 1676,—republished 2d of September, 1681, and proved by sentence of the Prerogative Court² on the 14th of July, 1683,—whereby he gives to Mary Gutheridge his lease of the Bishop’s land, “which will come to her by special occupancy as being my heir at law;” and he bequeaths legacies to his father and mother Gregory, his sister Frances Hall, his old aunt Saunders, and his cousin Sarah Hoare. Among other charitable bequests, he leaves to the poor of the parish of Barnwood, in the county of Gloucester, where he drew his first breath, the sum of 20*l.* to be distributed at the discretion of his father Gregory if he shall be living. His friends Nathaniel Earle and Jane his wife (the master and mistress of the house in which he lodged in Butcher Row) he appoints his executor and executrix and residuary legatees, “as some recompense for their care of him, and attendance upon him, for many years.”³

His armorial bearings.

His armorial bearings, which must have been granted to him when he was knighted, have been discovered by the diligence of that skilful antiquary, Mr. Pulman, Deputy Usher of the Black Rod; and, with those of the other Chief Justices from the earliest times, now ornament the splendid library of the House of Lords in the new palace at Westminster.

1. The editions of these Reports by the late Sergeant Williams, and by the present most learned Judges, Mr. Justice Patteson and Mr. Justice Vaughan Williams, illustrated by admirable notes, may be said to embody the whole common law of England, scattered about, I must confess, rather immethodically.

2. The *Prerogative Court* lost its jurisdiction when the *Court of Probate and Divorce* was instituted, 20 and 21 Vict., c. 77, c. 85.

3. Will in C. P. C. Reg. 147, Drax.

CHAPTER XXII.

CHIEF JUSTICES FROM THE DEATH OF SIR EDMUND
SAUNDERS TILL THE REVOLUTION.

ON the sudden death of Saunders, there was much perplexity as to the appointment of his successor. His want of political principle and his immoralities had been to a certain degree counterbalanced by his profound knowledge of the law, his mildness of disposition, and his popular manners. The candidate eagerly pressing forward his claims, and supported by the most unscrupulous courtiers, was notoriously destitute of public or private virtue,—knew nothing of his profession beyond what he had picked up in Old Bailey practice,—was brutally offensive in his deportment to all who were opposed to him; and, acting as a subordinate judge, had, on various occasions, set at defiance the rules of decency and the dictates of humanity. Even Charles II. himself—who, in making appointments, did not stand upon trifles as far as character was concerned, and who had been pleased to see sitting in his council Shaftesbury, who boasted of being, next to himself, the most profligate man in England—shuddered at the approach of Jeffreys.¹ say-

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XXII.
Jeffreys,
Chief Jus-
tice of the
King's
Bench.

1. The task of writing the life of "this very worst judge that ever disgraced Westminster Hall," as Mr. Justice Foster designated him, is most ungrateful, especially when the writer can find no ground for reversing the verdict that has been already pronounced. George Jeffreys was the younger son of John Jeffreys, of Acton, near Wrexham, in Denbighshire, a gentleman of ancient stock, but of comparatively slender means, by Margaret, daughter of Sir Thomas Ireland, of Bewsey in Lancashire. Born in 1648, his education began at the free school of Shrewsbury, and was continued, first at St. Paul's School in London, and then at Westminster under Dr. Busby, to whose tuition he often referred in his after-life.

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XXII.

Reasons
for his ap-
pointment.

ing, "That man has no learning, no sense, no manners, and more impudence than ten carted street-walkers."

Meanwhile, the trials arising out of the Rye House Plot were coming on, and vengeance was to be taken on the Whigs for their vigorous and often successful opposition to the measures of the Court since the sovereign of England had degraded himself into a viceroy of France. Good hopes had been entertained of Pemberton for presiding Judge, as he had received a severe warning against his occasional displays of independence by being removed from the King's Bench to the Common Pleas, with hints of the further punishment that might await him if he should not be more zealous in the public service. But he had nearly allowed Lord Russell to escape; and it was foreseen that, notwithstanding his timidity, he must necessarily direct the acquittal of Sydney, against whom there was no case, without making an old MS. essay on the speculative principles of government, found among his papers, an overt act of high treason. "Work was to be done which could be trusted to no man who revered law, or was sensible of shame."¹ Accordingly, there was placed in the supreme seat of justice, knowingly and designedly, one of the most infamous wretches who ever wore the human form, and whose atrocities, when elevated to power, were not more revolting than might have been expected from his established char-

He himself states in the Cambridge case that he was once a member of that university, but it is not known to what college he belonged, and he took no degree. His untractable disposition was early exhibited by his refusing to settle in some quiet course of trade, for which he was intended; and he was of so litigious a temper, and so fond of opposition and argument, that his father used to say to him, "Ah! George, George, I fear thou wilt die with thy shoes and stockings on." Choosing the law as his profession, he commenced his legal studies, with the pecuniary aid of his grandmother, at the Middle Temple, and was called to the bar on Nov. 22, 1669.—*Foss's Lives of the Judges*.

1. Macaulay, i. 452.

acter and past conduct. "All people were apprehensive of very black designs when they saw Jeffreys made Lord Chief Justice, who was scandalously vicious, and was drunk every day; besides a drunkenness of fury in his temper that looked like enthusiasm."¹

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XXII.

It would now be my duty to trace the extraordinary career of this monster, from his birth in an obscure Welsh village, to his death in the Tower of London, if I had not already done so in my "LIVES OF THE CHANCELLORS." Subsequent researches suggest little addition to the facts I have already narrated concerning him and no mitigation of the sentence of infamy which I have pronounced upon him. As a further proof of his contempt of decency on the bench, I may mention that on the trial of the learned and pious divine Richard Baxter, after exclaiming, in his own naturally violent tone, "This is an old rogue, a schismatical knave, a hypocritical villain; he hates the liturgy; he would have nothing but long-winded cant without book," the Lord Chief Justice suddenly turned up his eyes, clasped his hands, and began to sing through his nose, in imitation of what he supposed to be Baxter's style of praying, "LORD, WE ARE THY PEOPLE! THY PECULIAR PEOPLE!! THY DEAR PEOPLE!!!"²

Reference
to the Lives
of the
Chancel-
lors.

Additions
to the
"Life of
Jeffreys."

I ought to have dwelt more upon his venality during the "Bloody Assizes," for of the 841 prisoners whose lives were spared, and who were transported as slaves to the colonies, many were sold on his own account, and, long as was the voyage, and sickly, he calculated that from the state of the slave market, after all charges were paid, they would average 15*l.* a head.³ But the proceeds of all these sales did not

His venality during
the
"Bloody
Assizes."

1. Burnet, O. T., ii. 231.

2. 10 St. Tr. 1315; Life of Baxter, ch. xiv.

3. Original letters in the State Paper Office: Sunderland to Jeffreys, Sept. 14, 1685; Jeffreys to the King, Sept. 10, 1685.

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XXII.

fetch him so much as a single pardon. Most of the men accused of joining Monmouth¹ were from the lower ranks of life, and, except in the sale of their persons, they could be turned to little profit, for they could muster only a very small bribe to be let off, and, if convicted and executed, their forfeited property was seldom more than a flock of geese or a flitch of bacon. The Chief Justice was therefore delighted to find that he had got in his toils Edward Prideaux, who had inherited broad lands from his father, an eminent lawyer in the time of the Commonwealth, and who, without having been in arms, was suspected of favoring the rebellion. Although no witnesses could be got to swear against this gentleman, he wisely agreed to pay 15,000*l.* for his liberation. With his ransom Jeffreys became the purchaser of a large estate, the name of which the people changed to *Acceldama*,² as being purchased with the price of innocent blood.³

1. James Fitzroy, Duke of Monmouth, a natural son of Charles II., King of England, by Lucy Walters, one of his mistresses, was born at Rotterdam, 1649. At the Restoration he was created Earl of Orkney, and afterwards Duke of Monmouth, and K.G. For some time he was in the service of France with an English regiment, and signalized himself against the Dutch, for which he was made lieutenant-general. On his return to England he was sent to quell an insurrection in Scotland. After this he joined the disaffected party, who were in favor of excluding the Duke of York from the throne. He was also concerned in a plot against his father, for which he was pardoned, and then went to Holland, from whence he returned at the accession of James II., and, having landed in Dorsetshire, obtained many followers, who were decisively defeated at Sedgemoor, in Somersetshire, July 6, 1685. The Duke was taken in a corn-field and sent to London, where he was tried and beheaded on Tower Hill, July 15, 1685.—*Cooper's Biog. Dict.*

2. The reputed site of the "field of blood," bought with the "thirty pieces of silver," the price of the betrayal of the Saviour. It is situated on the side of the hill opposite the Pool of Siloam, near Jerusalem. There is here a long vaulted structure, of heavy masonry, in front of a precipice of rock. The interior is dug out to a depth of perhaps twenty feet, forming a huge charnel-house into which the bodies of the dead were thrown. It is traditionally of the time of Jerome. The soil was thought to consume the bodies within twenty-four hours. The place is no longer used for burial.—*Wheeler's Familiar Allusions.*

3. Commons' Journals, Oct. 9, Nov. 10, Dec. 26, 1690; Oldmixon, 706.

I ought, likewise, to have stated, as another instance of his unexampled cruelty, that, after his return from the west, and receiving the Great Seal, on the very day on which Alderman Cornish¹ was hanged and beheaded in Cheapside, he caused Elizabeth Gaunt to be burned alive at Tyburn, for having piteously given shelter to a fugitive who betrayed her. She was a Sister of Charity: her life had been passed in relieving the unhappy of all religious denominations, and she was well known as a constant visitor of the jails in the hope of enlightening and reforming their unhappy inmates. She met her fate with great composure; leaving behind her a paper in which, after describing what she had suffered from the ferocity of her jailer, and others who had oppressed her, she complained of "the tyranny of him, the great one of all, to whose pleasure she and so many other victims had been sacrificed—declaring that in as far as they had injured herself she forgave them, but, in that they were implacable enemies of that good cause which would yet revive and flourish, she left them to the judgment of the King of kings."²

To show that the memory of his cruelties remained in the country in which they were most conspicuously exhibited, so as to raise a desire to visit them on his descendants to the third generation,—I should likewise wish to add the anecdote that when he had been many years dead, and his name and title were extinct, the Countess of Pomfret, travelling into the west of

1. Alderman Henry Cornish, who was sheriff of London in 1680, and had then been very active in the discovery of the pretended "Popish Plot," was apprehended in the reign of James II., and accused of conspiring, with Lord Russell, against Charles II. He was tried, condemned, and executed within a week, Oct. 23, 1685. The perjury of the witnesses against him appeared so flagrant after his death, that in 1688 they were committed to prison by order of Parliament, and his estate was restored to his relations.—*Cooper's Biog. Dict.*

2. 11 St. Tr. 351-455; Burnet, O. T., i. 640.

CHAP. XXII. England, having been discovered to be his granddaughter, was insulted by the populace, and could not venture to proceed to the scene of the "Bloody Assizes."¹

Supposed
reluctance
of Jeffreys
to support
James
against the
Protestant
religion.

It has been objected to me, that I have done injustice to Jeffreys, by representing that he readily acquiesced in all James's measures for overturning the religion and liberties of his country, whereas he condemned many of them. This charge against me is founded merely on proofs of the hypocrisy and duplicity of the great delinquent. He did pretend to some, who were in opposition to the Court, that his Protestant conscience was shocked by the scheme of bringing in Popery; but at the same time he put the broad seal to the Declaration of Indulgence,² and, sitting in the illegal Court of High Commission, he abetted all the proceedings for converting Magdalene College,³ Oxford, into a Popish seminary. "The two

1. Granger, "Jeffreys."

2. The Declaration of Indulgence (1687) is the name given to the proclamation of James II. by which he declared that "as he would not force the conscience of any man himself, so neither would he allow any man to force the conscience of another." By this he hoped to show favor to the Roman Catholics without offending his Protestant subjects, whom he promised to keep in full possession of all the Church estates they had acquired at the Reformation. In order to disguise, at all events in some degree, that the real objects of this indulgence were the Papists, he promised full freedom of worship at the same time to moderate Presbyterians and Quakers. All the penal laws against the Roman Catholics were suspended, and the King declared himself resolved for the future to employ the best men in his service irrespective of their creed (February and June, 1687). In April next year James ordered this Declaration to be republished, and sent an order to the bishops that they should bid the clergy of their several dioceses read it from their pulpits after divine service on the Sundays, May 20th and 27th. It was their refusal to do this that led to the trial of the Seven Bishops.—*Low and Pulling's Dict. of Eng. Hist.*

3. Case of Magdalen College, Oxford (1687-88), was one of the causes which led to the downfall of James II. In 1687 the presidency of Magdalen College fell vacant, when James II. issued a letter ordering the election of one Anthony Farmer, a Roman Catholic, as president. Farmer was not only disqualified technically from holding the appointment, but was a man of notoriously immoral life and bad reputation. In

French agents, who were then resident in London, had very judiciously divided the English Court between them. Bonrepaux was constantly with Rochester;¹ and Barillon² lived with Sunderland. Lewis was informed in the same week by Bonrepaux that the Chancellor was entirely with the Treasurer, and by Barillon that the Chancellor was in league with the Secretary."³ Again: Jeffreys gave out to one party that he highly disapproved of the proceedings against the Seven Bishops, while it is quite certain that he declared in council, "The Government would be dis-

spite of the royal injunction, the Fellows elected one of their number, Dr. Hough, to the presidency, whereupon they were cited before the Commission. The proofs of Farmer's disgraceful conduct were indisputable, and the Commission cancelled his nomination, but insisted on the election of Parker, Bishop of Oxford, another Catholic, to the presidency. Again the Fellows refused, and for this all the Fellows except two, who yielded to the King's wishes, were suspended, and eventually deprived of their fellowships, and in a few months the whole revenues of the college were enjoyed by Catholics. Parker died not long after, and was succeeded by Gifford, a Romanist bishop; but in 1688 James, being anxious to conciliate his subjects, restored the ejected Fellows, and accepted Hough as president.—*Low and Pulling's Dict. of Eng. Hist.*

1. Lawrence Hyde, first Earl of Rochester, was the second son of Edward, Earl of Clarendon. He was an ultra-Tory, and was the leader of the high-Church party in the reign of Charles II. He became First Commissioner of the Treasury in 1679. At the accession of James II., in 1685, he was appointed Lord Treasurer (Prime Minister). Though extremely subservient to the policy of the King, he was removed from office in December, 1686, because he would not turn Roman Catholic. After the flight of James II., Hyde gave his adhesion to William III. Died in 1711.—*Thomas' Biog. Dict.*

2. Barillon, French ambassador in England (1677-1688), was employed by Louis XIV. to keep Charles II. and James II. in dependence upon France, or, at any rate, inactive in European politics. With this object he fomented the quarrel between the Court and the country party, writing to his master in 1687, "It may be held as an indubitable maxim that agreement between the King of England and his Parliament is not for the interest of your Majesty." When early in 1688 the national opposition seemed likely to endanger James's position, it was Barillon who advised the bringing over of Irish troops. Yet he allowed himself to be duped by Sunderland's assurances; and it was for this reason that, after he had been obliged to leave England by William, he was not appointed to attend James in Ireland.—*Low and Pulling's Dict. of Eng. Hist.*

3. Macaulay, ii. 67, cites Reresby's *Memoirs*; Luttrell's *Diary*, Feb. 2, 1688; Barillon, Feb. 14; Bonrepaux, Jan 25, Feb. 4.

CHAP. XXII. graced if such transgressors were suffered to escape, as was proposed by Sunderland, with a mere reprimand,"¹ and that he strenuously recommended the criminal information on which they were brought to trial—"counting with certainty on a conviction which would induce the right reverend defendants to save themselves from ruinous fines and long imprisonments by serving, both in and out of parliament, the designs of the sovereign."²

Vacancy in the office of Chief Justice of the King's Bench on the promotion of Jeffreys to be Lord Chancellor.
Sept. 29, 1685.

Jeffreys held the office of Chief Justice of the King's Bench rather more than two years, having been reappointed to it on the death of Charles II. by James II., who had been his early patron, and to whom he was more and more endeared as his inhuman disposition was more and more developed. Being created a peer, and introduced into the Cabinet, he soon undermined, by his superior vigor and servility, the influence of the Lord Keeper Guilford, and, having broken the heart of that mean-spirited but not unamiable man, his "campaign in the west" was rewarded with the Great Seal.

Perplexity about his successor.

A month was occupied in considering who should succeed him as Chief Justice of the King's Bench. Although Monmouth had been executed, and the blood of rebels had flowed till the feelings of all classes were outraged, and even the vengeance of James himself was satiated, the due filling up of the office was considered a matter of the last importance to the Government. The plan to change the religion of the country was now formed, and this was to be carried into effect by judicial decision rather than by

1. Journal of second Lord Clarendon, June 24, 1688; 12 St. Tr. 195.

2. This has been placed beyond all doubt by the original despatches of the French and Dutch ministers examined by Mr. Macaulay. Barillon, ^{May 24} June 3, 1688; Citters, July 11; Adda, ^{May 20} June 9, June 11.

military violence. The King expected to accomplish his object by extending what was called the "dispensing power" to all the laws of the realm, although it had been hitherto confined to common penal statutes, which were enforced by a pecuniary mulct. Where was a man to be found who, as head of the Common-law Judges, would himself declare, and would induce a majority of his brethren to join with him in declaring, that the King had the power contended for,—or, in other words, that, like the despotic princes on the Continent, he was above the law? That man was SIR EDWARD HERBERT! Of his steadiness on this question no doubt could be entertained—but when his appointment was recommended, two objections presented themselves: 1st. That he was quite ignorant of his profession; 2dly. That he was conscientious in his opinions, and of strictly honorable principles in private life. The former was easily surmounted from his known zeal in support of the prerogative; and though it was anticipated that some inconvenience might arise from his vicious habit of abstaining from what he believed to be wrong, hopes were entertained that, from his ultra-Tory notions, he would not boggle at any thing which might be required of him. Upon the whole, the opinion at Whitehall was, that, for the King's service, a safer choice could not be made. Accordingly, on the 11th of October, 1685, Sir Edward Herbert took his seat as Chief Justice of the Court of King's Bench, and I am called upon to give a sketch of his life.

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XXII.

Sir Edward
Herbert se-
lected on
account of
his opinion
on the
"dispens-
ing
power."

He was the youngest son of that Sir Edward Herbert whom I have commemorated as holding the Great Seal of England while in exile with Charles II.¹ During the Commonwealth, the children of the titular Lord Chancellor remained in England with their

His origin.

1. *Lives of the Chancellors*, vol. iii. ch. lxxiii.

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mother; and after his death at Paris, in 1657, they were reduced to great indigence. Edward was admitted on the foundation of Winchester School, and was elected from thence a probationer fellow to New College, Oxford. He was idle and volatile, but much liked for his warmth of heart and gentlemanly demeanor. He inherited a strong abhorrence of Roundheads, and he considered the Whigs as the same republican party under another name. From his earliest recollection to his latest breath, he looked upon the five members of the House of Commons whom his father, when Attorney General, had impeached of high treason by order of Charles I., as not less guilty than the regicides who had sat in the high court of justice; and he thought it of essential importance for the public good that the Crown should be armed with sufficient power to put down and to punish all who were inclined to sedition or schism.

Formation
of his polit-
ical creed.

With this bias on his mind, he began the study of the law in the Middle Temple, and, setting down all the arbitrary decisions of judges for sound law, and all the violent acts of the executive government for good constitutional precedents, while he imputed everything that he met with on the other side to faction and popular delusion, he brought himself to the belief that the kings of England were absolute at all points, with a very few exceptions; and that, although they might find it convenient to consult a parliament, they might rule, if they chose, by their own authority. But his knowledge of law was superficial, and was confined almost exclusively to cases connected with politics.

Under Charles II. there was a disposition to do as much as possible for the Herberts, on account of the sufferings of their father in the royal cause; and the two elder sons were pushed on in the army and navy:

but there was much difficulty in making any provision for Edward, who was called a lawyer, but was wholly unacquainted with the first principles of pleading and conveyancing; and, never having been intrusted with a brief by a private client, could not, without serious risk, be allowed to appear in the King's business in Westminster Hall. It was thought, however, that any thing would do for Attorney General in Ireland, where they have never been very exact in legal formalities. Accordingly, he was sent over there, and for several years was supposed to execute the duties of the office decently well under the Duke of Ormond,¹ the popular Lord Lieutenant. A residence in Dublin was then considered distant banishment. The transit from thence to London was often attended with great peril and delay, and intelligence was interchanged between the two islands very irregularly. He therefore longed for a return to *civilized life*, for which he had a keen relish; and, having laid by a little money, he resigned the Irish Attorney Generalship, and came to push his fortune at Whitehall. Still pretending to practise at the bar, he received a silk gown. The English attorneys were as shy of employing him as

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His superficial knowledge of law.

He is sent as Attorney General to Ireland.

A.D. 1683.
His position on his return.

1. James Butler, first Duke of Ormond, a celebrated Irish nobleman, who was descended from an ancient family of Tipperary, which had retained the hereditary dignity of cup-bearer to the English sovereigns from the beginning of the 13th century. Upon the outbreak of the Irish rebellion in 1640 he was appointed to command the royal troops, at the head of which he defeated the rebels at Dublin, Drogheda, Kilrush, and Ross. During the struggle between Charles I. and the parliamentarians, Ormond, who had been previously nominated Lord Lieutenant of Ireland, held that country for the King; but after Charles had been taken prisoner he resigned the command, and repaired to London, when he had an interview with the captive monarch at Hampton Court. During the reigns of Charles II. and James II., he was twice nominated Viceroy of Ireland, and twice lost the post through Court intrigue. In 1670 the notorious Colonel Blood, instigated, it is said, by Ormond's bitter enemy, the Duke of Buckingham, waylaid and dragged him from his coach with the intention of conveying him to Tyburn, and there hanging him. This infamous project was, however, frustrated by the rescue of the Duke. He died in 1688. "His claims on the royal gratitude," says Macaulay, "were superior to those of any other subject."—*Beeton's Biog. Dict.*

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A.D. 1685.

His ser-
vices as
Attorney
General to
the Duke
of York.

when he wore bombazine; but his connections, his principles, and his agreeable manners nevertheless obtained him favor at Court. He succeeded Sir George Jeffreys as Chief Justice of Chester;¹ and soon after, on the promotion of Sir John Churchill to be Master of the Rolls, he was appointed Attorney General to the Duke of York, and was knighted. Now he was often consulted on constitutional questions by his royal master, the heir presumptive; who, much pleased with the answers returned, set him down as fit to fill the highest offices in the law. He was particularly firm respecting the dispensing power;² and— notwithstanding the doubts upon the subject indicated by high prerogative lawyers, such as Lord Clarendon, Lord Keeper Bridgman, Lord Chancellor Nottingham, and Lord Keeper Guilford—maintained that the royal

1. Chester was probably a Roman military station, as its Celtic name, "Caerleon Vawr," would seem to attest. It is called *Deva* in the Roman geographical writings, and would seem, at any rate, to have been a trading-place of importance. In 894 it was captured by the Danes, who were, however, forced to surrender it to the English. It was a place of considerable importance as being the frontier town of the Welsh Marches. The Conqueror established an earldom of Chester, and Hugh Lupus, his nephew, became its palatine. He built the castle and founded the abbey of St. Werburgh. In 1237 the earldom was seized by Henry III., and has since been a royal appanage. In 1300, Edward, Prince of Wales, received the homage of the Welsh princes at Chester; and here for a time Henry IV. held Richard II. captive. The city suffered severely in the plagues of the sixteenth and seventeenth centuries, and especially in 1602-5. In 1642 Charles I. arrived in Chester. The citizens were warmly royalist. From July, 1643, until 1646, the city was continuously besieged or blockaded by the parliamentary forces, and at last honorably surrendered in February of the latter year. Great riots, however, occurred on the occasion of the visit of the Duke of Monmouth in 1683. Chester was created a bishopric by Henry VIII. in 1541, and its fine abbey church of St. Werburgh became the cathedral.—*Low and Pulling's Dict. of Eng. Hist.*

2. Clarke, in his Life of James II., mainly rests his justification of that monarch's conduct on the authority of Herbert. Speaking of the Test Act, he says, "One great inducement not to boggle at dispensing with it, was his calling to mind that in the late King's time, after his return from Scotland, and that he began to be much employed in his business, Mr. Herbert, then Ch. Justice of Chester, told him, that if he desired to reënter into his former employment, he could make it appear that it was in the King's power to dispense with the Test Act."

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CHURCHILL
XXV.

A. 1685.

Attorney
General to
the Duke
of York.

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assent was given to bills passed by the two Houses of Parliament on the implied condition that the King might suspend the operation of the law when necessary for the public safety; and that, this power being essentially inherent in the Crown, no statute could take it away, or abridge it. He was of the school of political speculators which produced Filmer,¹ LeStrange, and Brady,²—maintaining that the Crown is the only legitimate source of authority; that the House of Commons, having been created by the Crown, is subordinate to the Crown; and that, as it may still be prorogued or dissolved, as well as summoned, by the Crown, the Crown is entitled to exercise a paramount control over all its acts. He sometimes made a distinction between the King's power over common law and statute law: but, although he was known not to be without some scruples which might be troublesome, his friends said they would all melt away before his burning loyalty.

He is not once mentioned in the Reports: he had never led any important cause, or argued any important point of law, in an English court; and, although he regularly attended the King's Bench in term-time, it was for society rather than for business. He was considered a sort of *dilettante lawyer*, and probably he himself thought not of a higher office than that of Chief Justice of Chester, which only occupied a few

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His name
not men-
tioned in
the Re-
ports.

1. Sir Robert Filmer, an English political writer, born in the county of Kent. He was a staunch advocate of absolute monarchy, and endeavored to prove that this was the true and natural form of government. Locke wrote two treatises to refute this theory. Filmer wrote, among other works, "The Anarchy of a Limited and Mixed Monarchy," and "Patriarcha." Died in 1688.—*Thomas' Biog. Diet.*

2. Robert Brady (*d.* 1700), historian and physician, was born at Denver, Norfolk. At an uncertain date (1670 or 1685) he held the office of Keeper of the Records in the Tower, and took deep interest in studying the documents under his charge. He was admitted Fellow of the College of Physicians on Nov. 12, 1680, and was physician in ordinary to Charles II. and James II. His historical works are laborious, and are marked by the author's desire to uphold the royal prerogative.—*Stephen's Nat. Biog.*

CHAP. XXII. days of his time twice a year. It is quite certain that he never solicited, or in any way intrigued for, the office of Chief Justice of the King's Bench, so that he was greatly astonished when it was offered to him. He did not hesitate to accept it when he was told that the King required his services.

He is made
Chief Jus-
tice of the
King's
Bench.

There is no record of the ceremony of his installation. The merits and sufferings of his father must have constituted the staple of the Chancellor's address to him; and his answer must have been confined to the expression of gratitude for the unexpected dignity, and sincere good intentions in the fulfilment of his new duties.¹

October.
Favorable
inclination
towards
him, not-
withstanding
his un-
fitness.

The profession and the public, without nicely scanning his legal qualifications, were pleased to see mildness, equanimity, and sobriety again adorning the seat of justice, lately disgraced by fierceness, violence, and drunkenness. Even those who most highly disapproved of his politics were disposed to speak kindly of him. Says Burnet, "He was a well-bred and a virtuous man, generous and good-natured, although an indifferent lawyer. He unhappily got into a set of very high notions with relation to the King's prerogative. His gravity and virtues gave him great advantages; chiefly his succeeding such a monster."²

He was sworn a member of the Privy Council, but he was never admitted into the Cabinet.

In the private cases which came before him he was entirely guided by the opinion of the Puisne Judges; and, by discretion, and speaking only as he was prompted, he made a very respectable appearance, and the vulgar called him a great Judge.

A.D. 1686.
Lord
Delamere's
Case.

The first political case in which an opinion was required from him was the prosecution of Lord Delamere³ for high treason; and, as the prerogative of the

1. See 2 Shower, 434; 3 Modern Reports, 71.

2. Burnet, O. T., ii. 362, 363.

3. Henry Booth, Lord Delamere, was accused of having abetted Monmouth's rebellion.

Crown was not concerned in the question submitted to him, he displayed on this occasion moderation and diffidence. The noble lord, the object of the prosecution, had, when a member of the House of Commons, given mortal offence to Jeffreys, who now sat as his judge, and was eager to convict him. The trial took place before the Lord High Steward and a select number of Peers,—the Judges attending as assessors. The whole day being spent in giving evidence for the Crown, the noble prisoner applied for an adjournment till next morning, before opening his defence. Jeffreys determined, if possible, to sentence him to be hanged, beheaded, and quartered before going to sleep; but, desirous to keep up appearances, and to throw upon others the odium of the precipitation which he desired, said he would willingly comply with the request if the law would allow of an adjournment, which much doubting, he would put the question to the Judges. His real inclination being well known to them, he expected (what *he* would have pronounced under the like circumstances) a flat negative upon the power of adjournment. But Lord Chief Justice Herbert said,—

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“The Judges presume to acquaint your Grace that this is a matter wholly new to them, and that they know not, upon recollection of all that they can remember to have read, either that this matter was done or questioned. Had it received a determination, and been reported in our books, our duty would have been to contribute all our reading and experience for the satisfaction of this great Court; but being a new question, and the precedent being to make a rule respecting the powers and privileges of the Peers for the time to come, we cannot venture to resolve it. In the case of the trial of a peer in parliament, there have been adjournments from day to day; but whether it makes a difference that here the Lord High Steward sits judge, and the Peers-tries are in the nature of a jury, we submit to your Grace’s consideration. In an inferior court the jury, once sworn, are not allowed to separate, from the fear of corruption; but that reason seems to fail here, the prisoner being to be tried

a Opinion
delivered
by Herbert
on the
trial.

CHAP. by his peers, that are men of unsuspected integrity, and give
XXII. their verdict upon their honor."

The Peers, upon this, were for adjourning, but Jeffreys in a rage said "that the court was his, and that, he sitting as sole judge in it, they had no right to regulate its proceedings." He then gave a decided judgment that he could not and would not adjourn, and he ordered the prisoner to go on with his defence, saying that "by law the trial must finish before they separated." Nevertheless he was disappointed of his prey, for Lord Delamere made an admirable defence, and the Peers, sympathizing with him on account of the harsh treatment he had received, unanimously acquitted him.¹

Delamere's
defence
and ac-
quittal.

Soon after came on the grand question with a view to which Herbert had been appointed Chief Justice, and he fully answered the expectation which had been formed of him.

Sir Edward
Hales's
Case to es-
tablish the
Dispensing
Power.

Judicially to establish the dispensing power, a sham action was brought by the coachman of Sir Edward Hales against Sir Edward Hales, his master. The defendant, although a Roman Catholic, had been appointed Lieutenant of the Tower of London; and the declaration alleged that, contrary to the provisions of the Test Act, he had exercised the duties of the office without having made the declaration against transubstantiation or taken the oath of supremacy. By way of justification, he pleaded "that after the grant of the office the King, by letters patent under the Great Seal, *notwithstanding* any statutes or laws in that behalf, *dispensed* with his making the declaration against transubstantiation and with his taking the oath of supremacy, as well as with his receiving the sacrament according to the rites of the Church of England." The plaintiff demurred, admitting the dispensation and praying

1. 11 St. Tr. 510-599.

judgment upon its validity. Thus the existence of the dispensing power was regularly raised on the record, and was to be solemnly decided.

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The Chief Justice, although he had no doubts himself, found it a more difficult task than he had anticipated to prevail upon the other Judges to agree with him. According to the usual custom of those days, before the case was argued in court he assembled all the Judges to deliver their opinion upon it. To his unspeakable surprise, there were four Judges who declared that the King had no power to dispense with a statute which Parliament had enacted for the preservation of the established religion of the country. Their opposition was the less suspected because they were all four steady Tories, although not of such extravagantly high prerogative principles as Herbert himself; and they had all four sat on the trials of Alderman Cornish and Elizabeth Gaunt, where there had been an extraordinary compliance with the wishes of the Government. Their contumacy being reported to the King, he summoned them into his presence, and conversed with them at Whitehall, but could make no impression upon any of them either by soft or angry language. He thought he might safely calculate upon their supporting him in any violation of the constitution; but he forgot that where religion mixes in a controversy it is impossible to foretell with certainty what will be the conduct of any individual or of any body of men. "Jones, the Chief Justice of the Common Pleas, a man who had never before shrunk from any drudgery, however cruel or servile, now held, in the royal closet, language which might have become the lips of the purest magistrates in our history."¹ Being told that he must either give up his opinion or his place, "For my place," he answered, "I care little; I

Opposition
of some of
the Judges.

1. Macaulay, ii. 52.

CHAP.
XXII.Dissentient
Judges are
dismissed.

am old and worn out in the service of the Crown; but I am mortified to find that your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give." *King*: "I am determined to have twelve lawyers for judges who will be all of my mind as to this matter." *C. J. Jones*: "Your Majesty may find twelve *judges* of your mind, but hardly twelve *lawyers*." James always piqued himself on being a man of his word, and Jones had his *quietus* next morning. With him were dismissed Montagu, Chief Baron of the Exchequer, and two Puisnies, Neville and Charlton. Four new Judges were appointed, who had taken the royal test by declaring their belief in the unlimited, illimitable, and eternal nature of the dispensing power. One of them was the brother of the author of "Paradise Lost," and of the "Defence of the People of England for putting Charles I. to death." Sir Christopher Milton, recommended by Herbert, was in all respects a striking contrast to John, as he was not only a favorer of Popery, and a friend to arbitrary power, but the dullest of mankind.¹

Sawyer
and Finch
refuse to
argue the
demurrer.

June 16.

Some delay still arose in carrying the case to a hearing, for Sawyer, the Attorney General, who had brought Russell and Sydney to the block, refused to argue this sham demurrer in favor of an attempt "to annul the whole statute law from the accession of Elizabeth." Heneage Finch, the Solicitor General, following his example, was turned out of office; and time was required for the mean-spirited Powys, who succeeded him, to prepare for his dirty work.

At last the farce was acted, Northey taking the part of counsel for the plaintiff, and pretending to argue

1. Although not reconciled to Rome, he came so near her, that he would not communicate with the Church of England. Echard, iii. 797; Kennet, iii. 451.

that the dispensation was no bar to the action; while the new Solicitor General urged that the King's prerogative was and is as much the law of England as any statute; and that, although the King cannot prejudice private right, the power of dispensing with all public statutes was inseparably annexed to his crown.

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At the close of the argument, Herbert, C. J., said, with much gravity, that "the Court would take time to consider," and on a subsequent day he delivered the following judgment :

"This is a case of great consequence, but of as little difficulty as ever any case was that raised so great an expectation. If the King cannot dispense with this statute, he cannot dispense with any penal law whatsoever. There is no law but may be dispensed with by the supreme lawgiver. The laws of God may be dispensed with by God himself, as appears by God's command to Abraham to offer up his son Isaac. So, likewise, the law of man may be dispensed with by the legislator. A law may be either too wide or too narrow; the wisest lawgiver cannot foresee all the consequences of a law, and therefore there must be a power somewhere able to dispense with it. We have consulted our brethren who have met and conferred on the subject at Sergeants' Inn, and, with one exception, they all agree with us in the opinion that the kings of England are absolute sovereigns; that the laws of England are the King's laws; that the King has power to dispense with any of his laws as he sees necessity for it; that the King is the sole judge of that necessity; and that this is not a trust invested in or granted to the King by the people, but the ancient sovereign power and prerogative of the kings of England, which never yet was taken from them nor can be by parliament or any human means. My brother Street, indeed, is of opinion that the King, notwithstanding his general dispensing power, cannot validly grant the dispensation pleaded by the defendant; but that is the opinion of one single judge against the opinion of eleven. We therefore give judgment for the defendant."¹

Judgment
of Chief
Justice
Herbert.

Without the privity of Herbert, who was too honorable a man to have countenanced such trickery,

Sham dis-
sent of
Judge
Street.

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Street, who was known to be the most servile Judge on the bench, who would have been instantly turned adrift if he had been sincerely opposed to the dispensing power, but who cared as little for religion as for law, had been ordered to dissent, for the purpose of leading the public to believe that the Judges, left to the freedom of their own will, had decided for the Crown by a vast majority, without being entirely unanimous. So infamous a wretch was Street, that, at the Revolution, on the strength of this collusive dissent, he attempted to make court to King William; but, his real baseness being exposed, he met with a mortifying rebuff.¹

Upon this judgment Sir Robert Atkyns,² then an

1. "Dec. 27, 1688. Tuesday, in the morning, I went to St. James's with Judge Street to present him to the Prince; but I was told the Prince was busy, and I could not get admittance. While I was in the outward room, my Lord Coote came to me and to'd me he was sorry to see me patronize Street. 'He did not join in the judgment for the dispensing power; but he is a very ill man. I have given the Prince a true character of him; and therefore I desire your Lordship will not concern yourself any more for him.'"—*Diary of Henry, Earl of Clarendon*. However, when Judge Street died, a splendid marble monument was erected to his memory, with an inscription which asserts that he was the only honest Judge in the reign of James II.; and thus concludes:

"... faithful found;
Among the faithless, faithful only he;
Among innumerable false, unmoved,
Nor number, nor example, with him wrought,
To swerve from truth, or change his constant mind,
Though single."—*Granger*.

2. He was called to the bench as a Judge of the Common Pleas April 15, 1672. During the eight years he occupied that position he presided with fairness and moderation at many of the trials connected with the Popish Plot, in the existence of which he appears to have fully believed. He had the misfortune to go the Oxford Circuit with Chief Justice Scroggs, to whom his constitutional opinions were so obnoxious that Scroggs retailed them to the Court. Whether Sir Robert was dismissed in consequence, or voluntarily resigned on finding that his colleagues and the Government were discontented with him, does not precisely appear. But he received his *quietus* on Feb. 6, 1680; and on his examination before the House of Commons in 1689 he attributed his removal principally to the two Chief Justices, besides enumerating other causes—viz., his expressed objections against pensions to Parliament

ousted Judge (afterwards made Chief Baron of the CHAP. XXII. Exchequer), having published a very severe commen- Atkyns' common-law on Herbert's judgment. tary, Chief Justice Herbert published a pamphlet in his own vindication,—in which he produced what he called his authorities, and, in answer to the personal reflections upon himself, observed,

“I can truly say that I never heard of this action till it was Extract from Herbert's pamphlet in his own vindication. actually brought. If it be a feigned action, the law is as well settled in a feigned action as in a true. There are feigned actions directed out of Chancery every day, and why may not the King direct such an action to be brought to satisfy himself whether he hath such a power? If there were indirect means used to obtain opinions, I stand upon my innocence, and challenge all the world to lay anything of that kind to my charge. My part was only to give my own opinion; and if I have drawn

men; his assertion of the people's right to petition; and his denial of the King's power without Parliament to forbid the publication of books. The presumed displeasure of the Court stirred up the corporation of Bristol to oust Sir Robert from the recordership, first by prepared insults, and next by a prosecution for a pretended riot in an irregular civil election. They succeeded in procuring a conviction; but the judgment was arrested by the Court, Sir Robert appearing in person to argue the case. He was, however, persuaded for the sake of peace to resign the place, which was the real bone of contention. During the interval of Sir Robert's retirement he naturally took great interest in the political questions that agitated the country. He advised on the line of defence to be taken by Lord Russell, and after the Revolution he issued two tracts in assertion of that nobleman's innocence. He resisted King James's attempt to dispense with the penal statutes, in the publication of a lucid argument proving its illegality. He also printed a discourse relative to the ecclesiastical commission issued by that monarch. These and some other of his tracts were collected in a volume, which was published in 1734. It does not appear that he took any further part in promoting the Revolution than attending the Lords on their summons as one of their advisers after James's flight. His reputation as a lawyer was so high as to insure the admission of his name into the lists which King William desired the Privy Councillors to send in, and he was fixed upon to fill the office of Lord Chief Baron. In October, 1689, the Great Seal being in commission, Sir Robert was appointed Speaker of the House of Lords, over whom he presided till March, 1693, when Lord Somers was constituted Lord Keeper. He resigned his judicial seat on October 22, 1694. He lived about fifteen years more, residing quietly at his manor of Saperton, near Cirencester, where, on February 18, 1710, he died, after half an hour's indisposition. There is a monument to the memory of him and his father and brother in Westminster Abbey.—*Foss's Lives of the Judges.*

CHAP. weak conclusions from what I find in our books, how can I be
XXII. charged as a criminal? But I never gave a judgment with so many authorities to warrant it as in Sir Edward Hales's case. If it was to keep my judge's place, I then became the worst man in the world, only to keep that which most men know my friends found great difficulty in persuading me to accept."¹

Herbert in high favor and likely to be Chancellor.

King James was delighted beyond measure with the judgment, and with the defence of it; and, lauding himself for his sagacity in selecting such a Chief Justice, and taking personally to himself all the credit of the appointment, he passed such compliments and lavished such blandishments on Herbert, that Jeffreys was jealous, and reports were spread that the Great Seal would soon be transferred to a new Chancellor.²

He assists in giving effect to the Declaration of Indulgence.

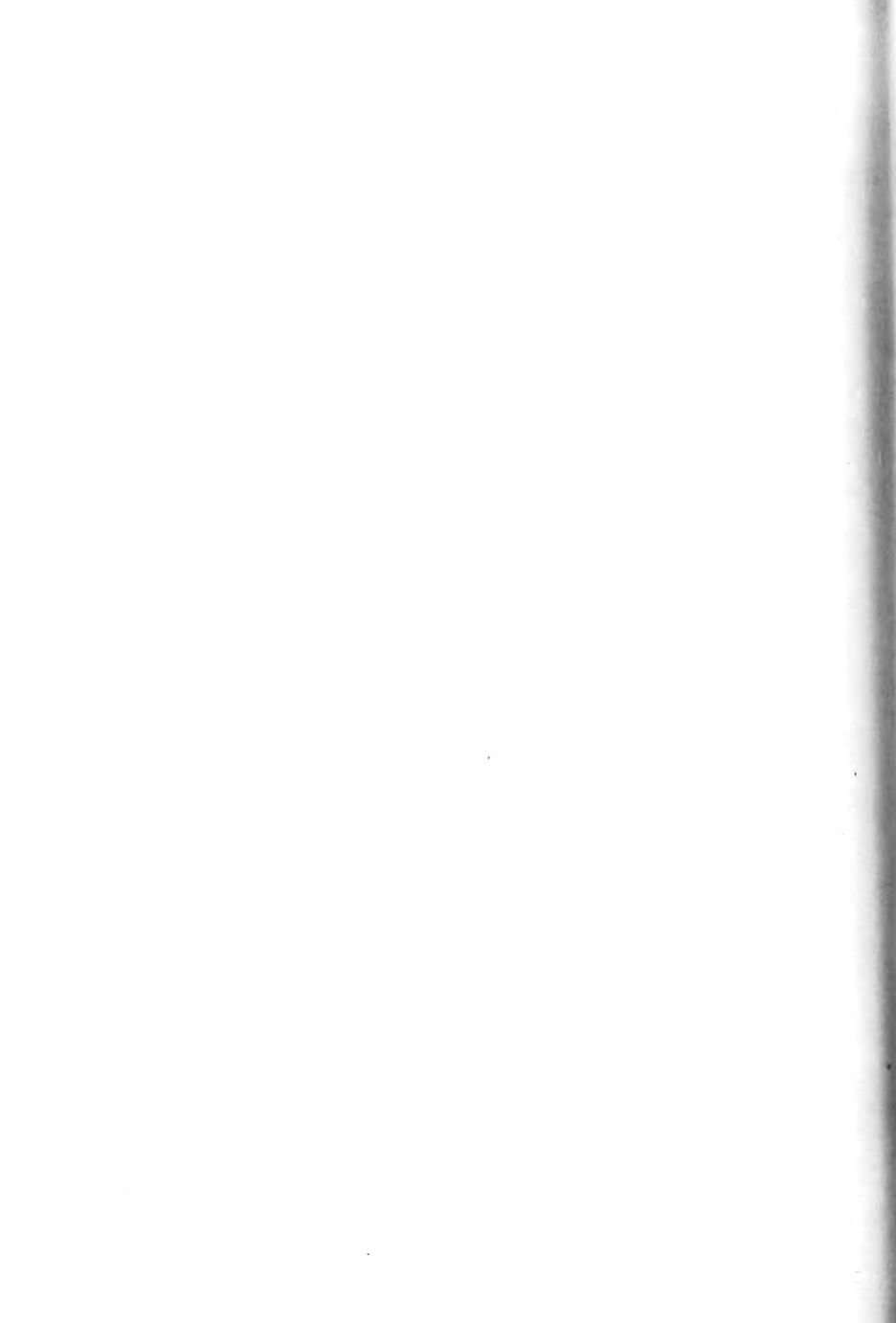
By way of preliminary to the restoration of Popery as the religion of the state, there soon came out a "Declaration of Indulgence," by which all sects of Christians were to be allowed to profess their faith without being subject to any disability, forfeiture, or penalty; and Herbert, sincerely thinking this a lawful exercise of the royal prerogative, delighted the King more than ever, not only by pronouncing in favor of its legality, but by actually assisting in giving effect to it. "Since the Church party could not be brought to

1. Whatever we may think of Herbert and his doctrine respecting the dispensing power, they have both had warm admirers. Clarke describes him, in his *Life of James II.*, as "a man of eminent learning and known integrity, sufficient to free him without further proof from the censure of partiality;" and says that, "for his further vindication, he published his reasons with some of the many citations and examples he might have brought from the law-books, which put the matter so far beyond dispute, that all the erudition of his adversaries or malice of his detractors could never furnish them with the least color of a reply."—2 *Clarke's James II.*, p. 82 *et seq.*

2. Lord Clarendon, in a letter to the Earl of Rochester, dated Dublin Castle, June 3, 1686, says, "A story had reached Dublin, that my Lord Chancellor is in very little credit; that my Lord Ch. Justice Herbert had exposed him upon the bench by laying open his briberies and corruptions (as they are called) in the West, with which the King is extremely offended, insomuch that it is said he will not be long in his place."—*Corresp. of Clar. and Roch.*, p. 426.



SIR THOMAS JONES.



comply with the design of the Court, applications were now made to the Dissenters; and all on a sudden the churchmen were disgraced, and the dissenters were in high favor. Chief Justice Herbert went the Western Circuit after Jeffreys's bloody one. And now all was grace and favor to them. Their former sufferings were much reflected on and pitied. Every thing was offered that could alleviate their sufferings. Their teachers were now encouraged to set up their conventicles again, which had been discontinued, or held very secretly, for four or five years, and intimations were given that the King would not have them or their meetings to be disturbed."¹

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Herbert
on the
Western
Circuit.

Burnet, from whom we have this account, adds, "Jeffreys was much sunk at Court, and Herbert was the most in favor. But now Jeffreys, to recommend himself, offered a bold and illegal advice."² This was to revive the Court of High Commission,³ whereby the clergy who should oppose the introduction of

The Court
of High
Commis-
sion re-
vived.

1. O. T., ii. 326, 327.

2. O. T., ii. 367, 370.

3. The Court of High Commission was the name given to a judicial committee instituted in the reign of Elizabeth to investigate ecclesiastical cases. Edward VI. and Mary frequently had recourse to the plan of exercising their jurisdiction in ecclesiastical matters through special commissioners. General commissions were issued by Edward in 1549 and 1551 to a number of royal councillors, theologians, and lawyers, to inquire into heresy and nonconformity, and a somewhat similar commission appeared in 1557, though in this case it was restricted to inquiry, and further action was left to the bishops' courts. The statute (1 Eliz., c. 1) restoring the royal jurisdiction in matters ecclesiastical empowered the Queen to nominate commissioners to exercise this power; accordingly two months later (July, 1559) a commission was directed to Parker, Grindal, and seventeen other persons, chiefly state officials and lawyers, which followed in the main the form of those of Mary. They were to inquire, "as well by the oaths of twelve good and lawful men, as also by witnesses, and *other ways and means ye can devise*," into offences against the acts of supremacy and uniformity, heresy, adulteries, and other ecclesiastical crimes. The subsequent commissions were drawn on the model of this one. The commission of 1583, on which Hallam has laid such stress, seems to differ little from preceding ones. But Whitgift appears to have used the power of proceeding by oath *ex-officio* more freely than his predecessors, and drew up an elaborate list of questions to be asked

CHAP. XXII. Popery might be deprived of their livings and punished for their contumacy. The author of this scheme was for a time dearer than ever to his master;—but before long there were again thoughts of removing him, as the brutality of his conduct and his manners threw discredit on the Government; and Jeffreys himself, who was always alarmed by rivals, had once more serious dread of being supplanted by Herbert. But, all of a sudden, Herbert was disgraced, and Jeffreys was firmly established in power.

Herbert
offends the
King by
denying
his power
to enforce
martial law
in time of
peace.

This change was produced by a point of law, on which, strange to say, the Chief Justice of the King's Bench, supposed to be slavishly obsequious, gave an opinion most highly distasteful to the owner of the dispensing power.

The plan was formed of ruling by a standing army. But, without a parliament, how was this army to be kept in a proper state of discipline? In time of war, or during a rebellion, troops in the field were subject

of the accused, a method which Burleigh complained of as "too much savoring of the Roman Inquisition." In the case of Cawdrey, it was held by the judges that the act did not abrogate the older ecclesiastical jurisdiction of the sovereign, nor lessen her power of imposing penalties. In the reign of James frequent disputes arose with the common-law courts as to the limits of the power of the High Commission; in 1611 Coke laid down that it had no right to fine or imprison, except in cases of heresy and schism, and, with six other judges, nominated members of the court by a new commission, refused to sit. During the whole of its existence the Court busied itself in enforcing uniformity, and little change in this respect was made by Laud. The number of ministers touched by the High Commission has been grossly exaggerated; during two years of its greatest activity only three persons were deprived and seven suspended. Laud's hand is rather to be seen in its increased vigilance in cases of adultery, and in the impartiality with which it punished offenders of rank. The Court was abolished by act of the Long Parliament (July, 1641). In 1609 a Court of High Commission had been established by James in each of the two archiepiscopal provinces of Scotland; Charles was obliged to consent to their abolition in September, 1635.—*Low and Pulling's Dict. of Eng. Hist.*

1. "The Court being established, Jeffreys was made perpetual president—*sine qua non*—to guard against the influence of Herbert, who was named a member of it."—O.T., ii. 367, 370.

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to martial law, and they might be punished, by sentence of a court-martial, for mutiny or desertion. But the country was now in a state of peace and profound tranquillity; and the common law, which alone prevailed, knew no distinction between citizen and soldier: so that, if a life-guardsmen deserted, he could only be sued for breach of contract, and if he struck his officer he was only liable to an indictment or an action of battery. While the King's military force consisted of a few regiments of household troops, with high pay, desertion was not to be apprehended, and military offences were sufficiently punished by dismissal from the service. But James found it impossible to govern the numerous army which he had collected at Hounslow without the assistance of martial law,—and he contended that, without any act of parliament, he was at all times entitled, by virtue of his prerogative, to put martial law in force against military men, although it could only be put in force against civilians when war or rebellion was raging in the kingdom.

Why the
King de-
sired this
power.

The question first arose at the Old Bailey, before Sir John Holt, then Recorder of London, and he decided against the Crown, as might have been expected: for, while avoiding keen partisanship in politics, he had been always Whiggishly inclined. James thought he was quite secure by appealing to the ultra-Tory, Lord Chief Justice Herbert. To the utter amazement of the King and the courtiers, this honorable, although shallow, magistrate declared that, without an act of parliament, all laws were equally applicable to all his Majesty's subjects, whether wearing red coats or gray. Being taunted with inconsistency in respect of his judgment in favor of the dispensing power, he took this distinction, "that a statute altering the common law might be suspended by the King, who is really the lawgiver, notwithstanding the form that he enacts,

Herbert's
opinion
confirms
that of
Holt.

CHAP. XXII. 'with the *assent* of the Lords Spiritual and Temporal, and Commons;' but that the common law cannot be altered by the King's sole authority, and that the King can do nothing contrary to the common law, as that must be considered coeval with the monarchy."

The King sets this opinion at defiance.

Herbert refuses to sanction the execution of a deserter unlawfully convicted. April 16, 1687.

James, with the infatuated obstinacy which was now driving him to destruction, set this opinion at defiance; and, encouraged by Jeffreys, caused a soldier to be capitally prosecuted, at the Reading assizes, for deserting his colors. The judges presiding there resorted to some obsolete inapplicable act of parliament, and were weak enough to lay down the law in the manner suggested to them by the Chancellor, so that a conviction was obtained. To give greater solemnity and *éclat* to the execution, the Attorney General moved the Court of King's Bench for an order that it might take place at Plymouth, in sight of the garrison from which the prisoner had run away. But Herbert peremptorily declared that the Court had no jurisdiction to make such an order, and prevailed on his brother Wythens to join with him in this opinion. Mr. Attorney *took nothing by his motion*, but the recreant Chief Justice and the recreant Puisne were both next morning dismissed from their offices, to make way for the most sordid wretches to be picked up in Westminster Hall—Sir Robert Wright, and Sir Richard Allibone,¹

¹ 1. The grandfather of this short-lived judge was an eminent divine, rector of Cheyneys in Buckinghamshire, whose third son, Job Allibond (for so Anthony Wood spells the name), turned Roman Catholic, got a comfortable place in the Post-office, died in 1672, and was buried at Dagenham in Essex. He was the father of Richard, who, born about 1621, rather late in life commenced his legal education at Gray's Inn on April 27, 1663. Though called to the bar on February 11, 1670, no mention is made of him till November, 1686, when, being a papist he was selected by King James to be one of his counsel, and knighted. On April 28, 1687, he was appointed a Judge of the King's Bench. In the summer of that year he went the Northern Circuit, and Bishop Cartwright relates that at Lancaster, while his colleague Judge Powell attended at the parish church, Allibone went to the schoolhouse and had

a professed papist.¹ Burnet, who has since been generally followed, represents that these removals took place on the eve of the trial of the Seven Bishops, and with a view to their conviction; but, in truth, the Second Declaration of Indulgence, out of which this celebrated prosecution arose, was not issued till a twelvemonth afterwards, and no human being had then imagined that the venerable fathers of the Anglican Church were to be arraigned at the bar of a criminal court for defending their religion in accordance both with human and divine laws.²

In consideration of Herbert's past services, in enabling the King to appoint the members of his own religion to all civil offices under color of judicial decision,—instead of being at once reduced to the ranks he was transferred to the office of Chief Justice of the Common Pleas, where it was thought he could do little harm.

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He is dismissed from the office of Chief Justice of the King's Bench, and made Chief Justice of the Common Pleas.

His notions of loyalty prevented him from making any complaint of an act done in the exercise of an undoubted prerogative of the Crown, and he quietly submitted to his fate. Jeffreys took care that he should be cut off from the chance of returning favor

mass. In his charge to the grand jury he took notice that only three of the gentry came out to meet the judges, and called it a great disrespect of the King's commission—a fact strongly indicative of the general feeling of dissatisfaction in the country. At the trial of the Seven Bishops in Trinity Term, 1688, Sir Richard laid down the most arbitrary doctrines, and exerted himself to the utmost to procure their conviction. On going the Home Circuit in July, immediately after the trial, he had the indecency in his charge to the Croydon jury to speak against the verdict of their acquittal, and to stigmatize their petition to the King as a libel that tended to sedition. His death on the 22d of the following month at his house in Brownlow Street probably saved him from attainder at the Revolution.—*Foss's Lives of the Judges*.

1. *Rex v. William Beal*, 3 Mod. 124. We shall find that they unscrupulously made the order. "Even previous to these removes and changes, the Court was gratified, and the people shocked, with the execution of two deserters, one of whom was hanged in Covent Garden, and the other on Tower Hill."—1 *Ralph*, 961.

2. Burnet's Own Times, ii. 466.

CHAP. XXII. by having him forbidden to come to Whitehall; and, as he was confined to the obscure duties of his office in considering dry questions of real property law, we read little more respecting him during the remainder of this reign.

His blunders in that office. Being sadly deficient in professional knowledge, and his Puisnies, Street, Jenner, and Lutwyche, being almost equally incompetent, the decisions of the Common Pleas while he presided there are not reported; and we are not even amused by his blunders, which are said to have been many and grievous. He still supported the Government in as far as he thought he honestly could, and, in the summer circuit of 1688, "he declared the intention of the King to call a parliament in November at the farthest, recommending the choice of such members as would comply with the King's wishes in repealing the penal laws and tests."¹

v.D. 1688.

At the investigation instituted, when too late, to contradict the story that James's son (afterwards known by the name of the Old Pretender²) was a supposititious child, brought into the Queen's bedchamber in a warming-pan, Herbert attended as a Privy Coun-

1. Rutt's *Life of Calamy*, i. 335 n.

2. James Francis Edward Stuart, called the Old Pretender, son of James II., King of England, was born 1688. On the death of his father, in 1701, he was acknowledged King of Great Britain by Louis XIV. (contrary to his promise to William III.), and by the King of Spain, the Pope, and the Duke of Savoy. In 1703, at the instance of Louis, he made a futile attempt to invade England from Dunkirk. Of this proceeding Queen Anne is said to have been cognizant; and upon her death he asserted his claim to the throne, and in September, 1715, his standard was set up by the Earl of Mar, at Brae-Mar; and a wide-spread spirit of disaffection to the house of Hanover prevailed in several parts of England. On December 22 the Pretender landed at Peterhead, in Scotland; but seeing his case hopeless, he fled back to France, whence he was obliged to remove to Italy, and thence to Spain. In 1719 he married Maria Clementina Sobieski (granddaughter of John Sobieski, King of Poland), by whom he had two sons, Charles Edward, the Young Pretender; and Henry, who is known as Cardinal York. She died in 1735. In 1722 he published at Lucca his famous Declaration, signed "James Rex," which was burnt at the Royal Exchange. He died at Rome, December 30, 1765. — *Cooper's Biog. Dict.*

cillor, and was of considerable service in conducting the examinations, which might have convinced all reasonable persons of the genuineness of the birth.¹

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The most honorable part of his career remains to be described. At the Revolution he did not, like Marlborough and others who had been loaded with Court favors, turn against his old master; nor did he, like some of James's councillors, who had remained true to him till he fled, attempt to make peace with the new Government. Forgetting the harsh usage which he had experienced, and conscientiously believing in the divine right of kings, he renounced his country, and followed into exile him whom he still considered his legitimate sovereign,—although his own brothers were William's staunchest supporters, and could easily have obtained his pardon on his making any concession to the new Government.

At the Revolution he adheres to King James.

A.D. 1689.

After the battle of the Boyne,² when James finally

A.D. 1690.

1. 12 St. Tr. 123.

2. A decisive victory won by William on the 1st of July, 1690, over the Irish and French, who, led by James II., Tyrconnel, and Lauzun, made a stand behind the river Boyne. Macaulay thus describes the valley of the Boyne: "Still William continued to push forward, and still the Irish receded before him, till, on the morning of Monday the 30th of June, his army, marching in three columns, reached the summit of a rising ground near the southern frontier of the county of Louth. Beneath lay a valley, now so rich and so cheerful that the Englishman who gazes on it may imagine himself to be in one of the most highly favored parts of his own highly favored country. Fields of wheat, woodlands, meadows bright with daisies and clover, slope gently down to the edge of the Boyne. That bright and tranquil stream, the boundary of Louth and Meath, having flowed many miles between verdant banks crowned by modern palaces, and by the ruined keeps of old Norman barons of the pale, is here about to mingle with the sea. Five miles to the west of the place from which William looked down on the river, now stands, on a verdant bank, amidst noble woods, Slane Castle, the mansion of the Marquess of Conyngham. Two miles to the east a cloud of smoke from factories and steam-vessels overhangs the busy town and port of Drogheda. On the Meath side of the Boyne, the ground, still all corn, grass, flowers, and foliage, rises with a gentle swell to an eminence surmounted by a conspicuous tuft of ash-trees which overshades the ruined church and desolate graveyard of Donore."—Vol. iii. p. 187.

CHAP. XXII. settled at St. Germain's,¹ and formed his mock ministry there, he got a new Great Seal fabricated by an engraver at Paris. This he delivered to Sir Edward

Herbert, with the title of "Lord Chancellor of England;" and the first use made of it was to affix it to a patent creating him Lord Portland, Baron Portland of Portland in the county of Dorset. He, no doubt, hoped to return, a second Clarendon, to enjoy in his native land the office granted to him while a banished man; but he was destined, like his own father, to be never more than a titular Chancellor, and to end his days in exile. Forty-one years after the death of his father, at Paris, he died there, and was interred in the same cemetery.

As he had so openly taken part with the Jacobites, he was expressly excepted from the Act of Indemnity passed by King William and Queen Mary; but this step was taken with reluctance, and, in the debates which led to it, strong testimony was borne to his good qualities:

Mr. Hawles: "If I would consult my affection, this is a gentleman I would have pardoned. I know him an honest gentleman. If I would plead for any of them, it should be for him. But since the penalty of death is passed over, yet I would have a punishment, though a mild one, and except him." *Sir Robert Cotton*: "Herbert did not come up to other judges, and order soldiers to be hanged for deserting their colors in time of peace." *Mr. Kendal*: "I hope you will consider Lord Chief Justice Herbert for the sake of a noble person, his brother, who lately

He is made Lord Chancellor by King James in exile.

A.D. 1698.

He is excepted from the Act of Indemnity.

Testimonies to his private worth.

1. After the English Revolution of 1688, James II. found at St. Germain the generous hospitality of Louis XIV. He lived here for thirteen years as the guest of the King of France, wearing always a penitential chain around his waist (like James IV. of Scotland) and daily praying God to pardon the ingratitude of his daughters Mary and Anne. Here his youngest child Louisa—"la Consolatrice"—was born, and here, as the choir in the Chapel Royal were singing the anthem, "Lord, remember what is come upon us, consider and behold our reproach" (September 2, 1701), he sank into the Queen's arms in the swoon from which he never recovered.—*Days near Paris*, p. 112.

had your thanks for good services in the cause of our liberties," CHAP. XXII.
Mr. Holt: "I had my education in Winchester College with Lord Chief Justice Herbert. I have discoursed this point of *dispensation* with him, and I can say it was his own true opinion; for he aimed at nothing of preferment, and he went not so far as King James would have had him." However, it was resolved without a division, "that Sir Edward Herbert be excepted out of the bill of indemnity, in respect of his having illegally decided that the King could dispense with the statutes of the realm."¹

He left no issue, and his title of *Portland* was given His brothers Whigs. to the branch of the illustrious family of Bentinck settled in England. It is a curious fact that he, the youngest of the family, alone adhered to the Cavalier principles of old Sir Edward; for the eldest brother, who rose to be a General in the army, fell fighting for King William in the battle of Aghrim,—while Arthur, the other brother, the famous Admiral Herbert (subsequently Earl of Torrington), after having resolutely opposed the suspension of the Test Act, favored the landing of the Prince of Orange, and was greatly instrumental in accomplishing the Revolution.²

I now come to the last of the profligate Chief Eminence of Sir Robert Wright among bad Judges. Justices of England, for since the Revolution they have all been men of decent character, and most of them have adorned the seat of justice by their talents and acquirements as well as by their virtues. SIR ROBERT WRIGHT, if excelled by some of his predecessors in bold crimes, yields to none in ignorance of his profession, and beats them all in the fraudulent and sordid vices.

He was the son of a respectable gentleman who His origin. lived near Thetford, in Suffolk, and was the represent-

1. 5 Parl. Hist. 336.

2. Burnet, ii. 365, 491, 510-527; Wood's Fasti, "Chief Justice Herbert."

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His idleness and depravity.

ative of an ancient family long seated at Kolverstone, in Norfolk;¹ he enjoyed the opportunity of receiving a good education at Thetford Free Grammar School, and at the University of Cambridge; and he had the advantage of a very handsome person and agreeable manner. But he was by nature volatile, obtuse, intensely selfish,—with hardly a particle of shame, and quite destitute of the faculty of distinguishing what was base from what was honorable. Without any maternal spoiling, or the contamination of bad company, he showed the worst faults of childhood, and these ripened, while he was still in early youth, into habits of gaming, drinking, and every sort of debauchery. There was a hope of his reformation when, being still under age, he captivated the affections of one of the daughters of Dr. Wren, Bishop of Ely, and was married to her. But he continued his licentious course of life, and, having wasted her fortune, he treated her with cruelty.

He fails in the profession of the law.

He was supposed to study the law at an Inn of Court, but when he was called to the bar he had not imbibed even the first rudiments of his profession. Nevertheless, taking to the Norfolk Circuit, the extensive influence of his father-in-law, which was exercised unscrupulously in his favor, got him briefs, and for several years he had more business than North (afterwards Lord Keeper Guilford), a very industrious lawyer, who joined the circuit at the same time. "But withal," says Roger, the inimitable biographer, "he was so poor a lawyer that he could not give an opinion upon a written case, but used to bring such cases as came to him to his friend Mr. North, and he wrote the opinion on a paper, and the lawyer copied it and signed under the case as if it had been his own. It run so low with him, that when North was at

1. MS. in Coll. Armor., furnished to me by my friend Mr. Pulman.

London he sent up his cases to him and had opinions returned by the post; and in the mean time he put off his clients upon pretence of taking more serious consideration."¹

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At last the attorneys found him out so completely that they entirely deserted him, and he was obliged to give up practice. By family interest he obtained the lucrative sinecure of "Treasurer to the Chest at Chatham," but by his voluptuous and reckless course of life he got deeper and deeper in debt, and he mortgaged his estate to Mr. North for 1,500*l.*, the full amount of its value. From some inadvertence the title-deeds were allowed to remain in Wright's hands, and, being immediately again in want, he applied to Sir Walter Plummer to lend him 500*l.* on mortgage, offering the mortgaged estate as a security, and asserting that this would be the first charge upon it. The wary Sir Walter thought he would make himself doubly safe by requiring an affidavit that the estate was clear from all encumbrances. This affidavit Wright swore without any hesitation, and he then received the 500*l.* But the money being spent, and the fraud being detected, he was in the greatest danger of being sent to jail for debt, and also of being indicted for swindling and perjury.

Fraud and
perjury of
which he
was guilty.

He had only one resource, and this proved available. Being a clever mimic, he had been introduced into the circle of parasites and buffoons who surrounded Jeffreys, at this time Chief Justice of the King's Bench, and used to make sport for him and his companions in their drunken orgies by taking off the other Judges, as well as the most eminent counsel. One day, being asked why he seemed to be melancholy, he took the opportunity of laying open his destitute condition to his patron, who said to him,

A.D. 1684.
He is
patronized
by Jef-
freys.

How he
was made
a Judge.

1. Life of Guilford, ii. 173.

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"As you seem to be unfit for the bar, or any other honest calling, I see nothing for it but that you should become a judge yourself." Wright naturally supposed that this was a piece of wicked pleasantry, and, when Jeffreys had declared that he was never more serious in his life, asked how it could be brought about, for he not only felt himself incompetent for such an office, but he had no interest, and, still more, it so happened, unfortunately, that the Lord Keeper Guilford, who made the judges, was fully aware of the unaccountable lapse of memory into which he had fallen when he swore the affidavit for Sir Walter Plummer, that his estate was clear from all encumbrances, the Lord Keeper himself being the first mortgagee. *Jeffreys, C. J.*: "Never despair, my boy; leave all that to me."

Jeffreys
urges the
King to
appoint
him.

We know nothing more of the intrigue, with certainty, till the following dialogue took place in the royal closet. We can only conjecture that in the meanwhile Jeffreys, who was then much cherished at Court, and was impatient to supersede Guilford entirely, had urgently pressed the King that Wright might be elevated to the Bench as a devoted friend of the prerogative, and that, as the Lord Keeper had a prejudice against him, his Majesty ought to take the appointment into his own hands. But we certainly know that, a vacancy occurring in the Court of Exchequer, the Lord Keeper had an audience of his Majesty to take his pleasure on the appointment of a new Baron,—and that he named a gentleman at the bar, in great practice and of good character, as the fittest person to be appointed, thinking that Charles would nod assent with his usual easy indifference,—when, to his utter amazement, he was thus interrogated: "My Lord, what think you of Mr. Wright? Why may not he be the man?" *Lord Keeper*: "Be-

cause, Sir, I know him too well, and he is the most CHAP. XXII. unfit person in England to be made a judge." *King:* The Lord Keeper's opinion of Wright's qualifications for the office of Baron of the Exchequer. "Then it must not be." Upon this the Lord Keeper withdrew, without having received any other notification of the King's pleasure; and the office remained vacant.

Again there is a chasm in the intrigue, and we are driven to guess that Jeffreys had renewed his solicitation,—had treated the objections started to Wright as ridiculous,—and had advised the cashiering of the Lord Keeper if he should prove obstinate. The next time that the Lord Keeper was in the royal presence, the King, opening the subject of his own accord, observed, "Good my Lord, why may not Wright be a judge? He is strongly recommended to me; but I would have a due respect paid to you, and I would not make him without your concurrence. Is it impossible, my Lord?" *Lord Keeper:* "Sir, the making of a judge is your Majesty's choice, and not my pleasure. I am bound to put the seal as I am commanded, whatever the person may be. It is for your Majesty to determine, and me, your servant, to obey. But I must do my duty by informing your Majesty of the truth respecting this man, whom I personally know to be a dunce, and no lawyer; who is not worth a groat, having spent his estate by debauched living; who is without honesty, having been guilty of wilful perjury to gain the borrowing of a sum of money. And now, Sir, I have done my duty to your Majesty, and am ready to obey your Majesty's commands in case it be your pleasure that this man be a judge." The King thanked the Lord Keeper without saying more, but next day there came a warrant under the sign manual for creating the King's "trusty and well-beloved Robert Wright" a Baron of his Exchequer, and orders were given for making out the patent in due form. The King appoints him to the office.

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Scene in
Westmin-
ster Hall
between
the Lord
Chief Jus-
tice of the
King's
Bench and
the Lord
Chancel-
lor.

Meanwhile, Jeffreys gave an instance of that grotesque buffoonery with which he loved to intermix his most atrocious actions. He wished to proclaim to the world, as a proof of his ascendancy, that he had promoted Wright to be a judge in spite of the Lord Keeper. Therefore, while the Lord Keeper was sitting on the bench, Jeffreys, arrayed in his costume as Chief Justice, entered Westminster Hall, and in the midst of a vast crowd of barristers and strangers walked up towards the Court of Chancery, which was then open to the hall; "he then beckoned to Wright to come to him, and, whispering in his ear, he flung him off, holding out his arms towards the Lord Keeper, as much as to say, 'in spite of that man above there, thou shalt be a judge.'" His Lordship "saw all this, as it was intended he should, and it caused him some melancholy."¹ But, rather than give up the Great Seal, his Lordship affixed it to Wright's patent; and the detected swindler, knighted and clothed in ermine, took his place among the twelve judges of England.

The motive
of Jeffreys
for
Wright's
appoint-
ment.

"Some may allege that I bring forward circumstances too minute; but I fancy myself a picture-drawer, and I am to give the same image to a spectator as I have of the thing itself, which I desire should be here represented. History is, as it were, the portrait or lineament, and not the bare index or catalogue, of things done; and without the *why* and the *how*, all history is jejune and unprofitable."² Therefore I should like to explain the motive of Jeffreys for such an appointment. He could not possibly have received a bribe for it, Wright not having a shilling in the world to give him; and it did not lead to the shedding of blood, whereby a natural taste of his might be gratified;—but he perhaps wished to

1. Life of Guilford, ii. 175, 176.

2. Life of Guilford, ii. 178.

have upon the bench a man whom he considered more obnoxious to censure than himself; or he might simply look to the gratification of his vanity, by showing his influence to be so great that, in spite of the Lord Keeper, he could elevate to be a Baron of the Exchequer a man whom no one else would have proposed for a higher office in the law than that of a *bound-bailiff*.¹ People were exceedingly shocked when they saw the seat of justice so disgraced; but this might be what he intended; and one of his first acts, when he himself obtained the Great Seal, was to promote his *protégé* from being a Baron of the Exchequer to be a Judge of the Court of King's Bench.

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Wright promoted from being a Baron of the Exchequer to be a Justice of the King's Bench, Oct. 11, 1685.

Wright continued to do many things which caused great scandal, and, therefore, was dearer than ever to his patron, who would have discarded him if he had shown any symptoms of reformation. He accompanied General Jeffreys as aide-de-camp in the famous "campaign in the West:"—in other words, he was joined in commission with him as a Judge in the "bloody assize," and, sitting on the bench with him at the trial of Lady Lisle and the others which followed, concurred in all his atrocities.² He came in for very little of the bribery,—Jeffreys, who claimed the lion's share, tossing him by way of encouragement one solitary pardon, for which a small sum only was expected.

But on the death of Sir Henry Beddingfield³ he

A.D. 1687.

1. I have heard it repeated as a saying of a departed statesman, who long ruled over Scotland, that "a minister gains much more by appointing a worthless than a worthy man to a public office, for in the latter case only a few can hope for favor, whereas in the former the great mass of the population consider themselves within reach of the government patronage, and in consequence are eager to support you."

2. Granger's expression is, "He had his share in the Western massacre" (p. 311).

3. Henry Beddingfield was the fourth of five sons of John Beddingfield, of Halesworth in Suffolk. He was born in 1633, and, having been called to the bar at Lincoln's Inn on May 7, 1657, was raised to the degree of the coif in 1663; being made King's Sergeant some time after, and

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XXII.He is made
Chief Jus-
tice of the
King's
Bench.

was made Chief Justice of the Common Pleas; and very soon afterwards, the unexpected quarrel breaking out between Sir Edward Herbert and the Government about martial law and the punishment of deserters,—the object being to find some one who by no possibility could go against the Government, or hesitate about doing any thing required of him however base or however bloody, Wright was selected as Chief Justice of the King's Bench. Unluckily we have no account of the speeches made at any of his judicial installations, so that we do not know in what terms his learning and purity of conduct were praised, or what were the promises which he gave of impartiality and of rigorous adherence to the laws of the realm.

April 21.

On the very day on which he took his seat on the bench he gave good earnest of his servile spirit. The Attorney General renewed his motion for an order to execute at Plymouth the deserter who had been capitally convicted at Reading for deserting his colors.

knighted. In 1684 he was elected sub-steward of Great Yarmouth. Roger North calls him "a grave but rather heavy lawyer; but a good churchman and loyal by principle." He relates that Lord Guilford "had cast his eye upon him," and informed him of his intention to nominate him for a vacancy on the bench. The Sergeant gratefully declared he would "ever own his preferment as long as he lived to his Lordship, and to no other person whatever." But on hearing this, Chief Justice Jeffreys, jealous of the Lord Keeper's power, sent to the Sergeant's brother, a woollen-draper in London, afterwards Lord Mayor, who was one of his creatures and boon companions, and told him that if his brother so much as went to the Lord Keeper, he would oppose him, and he should not be a judge at all. The poor Sergeant, whose "spirits were not formed for the heroics," was obliged to conform, and accordingly was not raised to the bench during Lord Guilford's life. He however received the promotion soon after that nobleman's death, being appointed a Judge of the Common Pleas on February 13, 1686. It is to be presumed that, either from his own conviction or the arguments of Jeffreys, he acknowledged the King's power to dispense with the penal laws, as two months after, upon the recommendation of the same arrogant patron, he was raised to the head of that court, on April 21, on the discharge of Chief Justice Jones. He did not enjoy this dignity much more than nine months, dying suddenly while receiving the sacrament in Lincoln's Inn Chapel, on Sunday, February 6, 1687. A mural monument of white marble was erected to his memory in Halesworth Church.—*Foss's Lives of the Judges.*



THOMAS CARTWRIGHT, BISHOP OF CHESTER.



The new Chief Justice, without entering into reasons, or explaining how he came to differ from the opinion so strongly expressed by his predecessor, merely said "Be it so!" The puisnics now nodded assent, and the prisoner was illegally executed at Plymouth under the order so pronounced.¹

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He orders
a deserter
to be
hanged,
contrary to
law.

Confidence was entirely lost in the administration of justice in Westminster Hall, for all the three common-law courts were at last filled by incompetent and corrupt Judges. Pettifogging actions only were brought in them, and men settled their disputes by arbitration or by taking the opinion of counsel. The Reports during the whole reign of James II. hardly show a single question of importance settled by judicial decision. Thus, having no distinct means of appreciating Chief Justice Wright's demerits as a Judge in private causes, we must at once follow him in his devious course as a political Judge.

His de-
merits as a
Judge in
private
causes.

The first occasion on which, after his installation, he drew upon himself the eyes of the public was when he was sent down to Magdalene College, Oxford, for the purpose of turning it into a Popish seminary. Upon a vacancy in the office of president, the Fellows, in the exercise of their undoubted right, had elected the celebrated Dr. Hough, who had been duly admitted into the office; and the preliminary step to be taken was to annul the election, for the purpose of making way for another candidate named by the King. There were associated with Wright, in this commission, Cartwright,² Bishop of Chester, who was ready to be reconciled to Rome in the hope of higher prefer-

October.
He acts as
one of the
visitors to
introduce
Popery
into
Magdalene
College,
Oxford.

1. *Rex v. William Beal*, 3 Mod. 124, 125.

2. Thomas Cartwright, a native of Northampton, was educated at Queen's College, Oxford. At the Restoration he was made chaplain to the King, and Prebendary of St. Paul's; and on the death of Dr. Pearson, 1686, was raised to the see of Chester. He favored the proceedings of James II., whom he accompanied to France and to Ireland. He died at Dublin, April 15, 1689, aged 55.—*Cooper's Biog. Dict.*

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The insolence of his behavior in annulling Dr. Hough's election to the presidency of the college.

ment, and Sir Thomas Jenner,¹ a Baron of the Exchequer, a zealous follower in the footsteps of the Chief Justice of the King's Bench. Nothing could equal the infamy of their object except the insolence of their behavior in trying to accomplish it. They entered Oxford escorted by three troops of cavalry with drawn swords, and, having taken their seats with great parade in the hall of the college, summoned the Fellows to attend them. These reverend and gallant divines appeared, headed by their new president, who defended his rights with skill, temper, and resolution; steadily maintaining that, by the laws of England, he had a freehold in his office, and in the house and revenues annexed to it. Being asked whether he submitted to this royal visitation, he answered,—

“My Lords, I do declare here, in the name of myself and the

1. Thomas Jenner was the son of Thomas Jenner, Esq. He was born at Mayfield in Sussex in 1638, and was admitted a pensioner of Queen's College, Cambridge, in June, 1655, but left the University without a degree. In 1660 he was fortunate enough to marry Anne, the daughter and heir of James Poe, the son of Dr. Leonard Poe, physician to Queen Elizabeth and her two successors. At the coronation of Charles II. in 1661 he figured as esquire to Sir John Bramston, then created a Knight of the Bath; and in November, 1663, he was called to the bar by the Inner Temple. On October 16, 1683, the King, having previously knighted him, appointed him Recorder of London, immediately after the forfeiture of the charters of that corporation. Evelyn calls him at this time “an obscure lawyer.” He was raised to the degree of the coif on the 23d of January following, and was at the same time made King's Sergeant. In many of the state trials that followed he was employed to prosecute, and proved himself, if not a very efficient, a very zealous advocate for the Crown. On King James's accession he was elected member for Rye, but had no opportunity of speaking during the month that the sittings lasted. The last occasion of his acting as King's Sergeant was in January, 1686, at the trial of Lord Delamere for high treason, who was acquitted by the Lords. A month after, on February 5, he was constituted a Baron of the Exchequer, and no doubt had previously satisfied the King that he would support his Majesty's claim of power to dispense with the penal laws, for disputing which his predecessor had been discharged. In October, 1687, he was sent with Bishop Cartwright and Chief Justice Wright on the notorious visitation of Magdalen College, Oxford, when Dr. Hough was expelled from the presidency. He however voted in the minority against suspending the Fellows of the college.—*Foss's Lives of the Judges*.



MAGDALENE COLLEGE, OXFORD.
The Tower.



Fellows, that we submit to the visitation as far as it is consistent with the laws of the land and the statutes of the college, and no further." *Wright, C. J.*: "You cannot imagine that we act contrary to the laws of the land; and as to the statutes, the King has dispensed with them. Do you think we come here to break the laws?" *Hough*: "It does not become me, my Lords, to say so; but I will be plain with your Lordships. I find that your commission gives you authority to alter the statutes. Now, I have sworn to uphold and obey them; I must admit no alteration of them, and by the grace of God never will." He was asked whether one of the statutes of the founder did not require mass to be said in the college chapel; but he answered, "not only was it unlawful, but it had been repealed by the act of Parliament requiring the use of the Book of Common Prayer." However, sentence was given, that the election of Hough was void, and that he be deprived of his office of president. *Hough*: "I do hereby protest against all your proceedings, all you have done, or shall hereafter do, in prejudice of me and my right, and I appeal to my sovereign lord the King in his courts of justice." "Upon which (says a contemporary account), the strangers and young scholars in the hall gave a *hum*, which so much incensed their Lordships, that the Lord Chief Justice was not to be pacified, but, charging it upon the president, bound him in a bond of 1,000*l.*, and security to the like value, to make his appearance at the King's Bench bar the 12th of November; and, taking occasion to pun upon the president's name, said to him, 'Sir, you must not think to *huff* us.'" He then ordered the door of the president's house to be broken open by a blacksmith; and a Fellow observing, "I am informed that the proper officer to gain possession of a freehold is the sheriff with a *posse comitatus*," Wright said, "I pray who is the best lawyer, you or I? Your Oxford law is no better than your Oxford divinity. If you have a mind to a *posse comitatus*, you may have one soon enough."

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Hough's
defence.

Having ejected Hough, issued a mandate for expelling all the contumacious Fellows, and insured the expulsion of James from his throne, the commissioners returned in triumph to London.¹

Wright was likewise a member of the Ecclesiastical

1. 12 St. Tr. 1-114.

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Wright
sits as
a member
of the High
Commis-
sion Court.

Court of High Commission,¹ of which Jeffreys was president, and he strenuously joined in all the judgments of that illegal and arbitrary tribunal, which, with a *non obstante*, had been revived in the very teeth of an existing act of parliament. He treated with ridicule the scruples of Sancroft,² the Archbishop of Canterbury, and others who refused to sit upon it, and he urged the infliction of severe punishment on all who denied its jurisdiction.

Although he was not a member of the Cabinet, he usually heard from the Chancellor the measures which had been resolved upon there, and he was ever a willing tool in carrying them into effect.

His activity in forcing the clergy to read the Declaration of Indulgence.

When the clergy were insulted, and the whole country was thrown into a flame, by the fatal Order in Council for reading the "Declaration of Indulgence" in all churches and chapels on two successive Sundays, he contrived an opportunity of declaring from the bench his opinion that it was legal and obligatory. Hearing that the London clergy were almost unanimously resolved to disobey it, he sent a peremptory

1. In spite of the act of 1641, and that of 1661, confirming it, James II., in July, 1686, created a new Court of Commission for ecclesiastical causes. It consisted of seven members—the Chancellor Jeffreys, Sancroft (who refused to sit), the Bishops of Durham and Rochester, the Lord Treasurer, the Lord President, and the Chief Justice. By this court Compton was suspended from his episcopal functions, the Vice-Chancellor of Cambridge deprived of his office, and Hough's election as President of Magdalen quashed. It was abolished by the Bill of Rights.—*Low and Pulling's Dict. of Eng. Hist.*

2. William Sancroft, an eminent English prelate, who was educated at Emmanuel College, Cambridge, where he obtained a fellowship, which he lost in 1649 for refusing to subscribe to the Solemn League and Covenant. After the Restoration he became chaplain to the Bishop of Durham; in 1664 he was made Dean of York, whence he removed to the deanery of St. Paul's. In 1677 he was raised to the highest station in the English Church, in which office he conducted himself with zeal and judgment. He was one of the Seven Bishops sent to the Tower by James II.; but when the Prince of Orange was declared King as William III., he refused to take the oaths, and lost his dignities. He then retired into private life. Born in 1616; died in 1693.—*Becton's Biog. Dict.*



WILLIAM SANCROFT, ARCHBISHOP OF CANTERBURY.
After a Painting by Luttrell.



command to the priest who officiated in the chapel of Sergeants' Inn to read the Declaration with a loud voice; and on the famous Sunday, the 20th of May, 1688, he attended in person, to give weight to the solemnity. However, he was greatly disappointed and enraged to find the service concluded without any thing being uttered beyond what the rubric prescribes. He then indecently, in the hearing of the congregation, abused the priest as disloyal, seditious, and irreligious, for contemning the authority of the Head of the Church. The clerk ingeniously came forth to the rescue of his superior, and took all the blame upon himself by saying that "he had forgot to bring a copy," and the Chief Justice, knowing that he had no remedy, was forced to content himself with this excuse.¹

The Seven Bishops being committed to the Tower, and prosecuted for a conspiracy to defame the King and to overturn his authority, because they had presented a petition to him praying that they might not be forced to violate their consciences and to break the law, Wright, the lowest wretch that had ever appeared on the bench in England, was to preside at the most important state trial recorded in our annals. The reliance placed upon his abject subserviency no doubt operated strongly in betraying the Government into this insane project of treating as common malefactors the venerable fathers of the Protestant Church, now regarded by the whole nation with affectionate reverence. The consideration was entirely overlooked by the courtiers, that, from the notorious baseness of his character, his excessive zeal might be revolting to

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May 20,
1688.

Prosecu-
tion of the
Seven
Bishops.

1. The two clergymen who were most applauded on this occasion were—the bold one, who, refusing to obey the royal mandate, took for his text, "Be it known unto thee, O King, that we will not serve thy gods, nor worship the golden image which thou hast set up;" and the humorous one, who having said, "My brethren, I am obliged to read this Declaration, but you are not obliged to listen to it,"—waited till they were all gone, clerk and all, before the reading of the Declaration began.

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the jury, and might produce an acquittal. It is supposed that a discreet friend of the Government had given him a caution to bridle his impetuosity against the accused, as the surest way of succeeding against them; for, during the whole proceeding, he was less arrogant than could have been expected, and it is much more probable that his forbearance arose from obedience to those whom he wished to please, than from any reverence for the sacred character of the defendants or any lurking respect for the interests of justice.

June 8.
Arraign-
ment.

They were twice placed at the bar before him: first when they were brought up by the Lieutenant of the Tower to be arraigned, and afterwards when a jury was impanelled for their trial. On the former occasion the questions were whether they were lawfully in custody, and were then bound to plead? The Chief Justice checked the opposing counsel with an air of impartiality, saying, "Look you, gentlemen, do not fall upon one another, but keep to the matter in hand." And, before deciding for the Crown, he said, "I confess it is a case of great weight, and the persons concerned are of great honor and value. I would be as willing as anybody to testify my respects and regards to my Lords the Bishops, if I could see anything in their objections worth considering. For here is the question, whether the fact charged in the warrant of commitment be such a misdemeanor as is a breach of the peace? I cannot but think it is such a misdemeanor as would have required sureties of the peace, and if sureties were not given a commitment might follow."

Injustice in
refusing
leave to put
in a plea in
abatement.

He was guilty of gross injustice in refusing leave to put in a plea in abatement; but he thus mildly gave judgment: "We have inquired whether we may reject a plea, and, truly, I am satisfied that we may if the plea is frivolous; and this plea containing no more

than has been overruled already, my Lords the Bishops must now plead *guilty* or *not guilty*." CHAP.
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When the trial actually came on, he betrayed a partiality for which, in our times, a judge would be impeached; but, compared with himself, so decorous was he, that he was supposed to be overawed by the august audience in whose presence he sat. It was observed that he often cast a side glance towards the thick rows of earls and barons, by whom he was watched, and who, in the next parliament, might be his judges. One bystander remarked that "he looked as if all the peers present had halters in their pockets." June 29.
Trial.

The counsel for the Crown having, in the first instance, failed to prove a publication of the supposed libel in the county of Middlesex, and only called upon the Court to suppose or presume it, the Chief Justice said—"I cannot suppose it; I cannot presume anything. I will ask my brothers their opinion, but I must deal truly with you; I think there is not evidence against my Lords the Bishops. It would be a strange thing if we should go and presume that these Lords did it when there is no sort of evidence to prove that they did it. We must proceed according to forms and methods of law. People may think what they will of me, but I always declare my mind according to my conscience." He was actually directing the jury to acquit, and the verdict of *not guilty* would have been instantly pronounced, when Finch, one of the counsel for the Bishops, most indiscreetly said they had evidence on their side to produce. The young gentleman was pulled down by his leaders, who desired the Chief Justice to proceed. And now his Lordship showed the *cloven foot*, for he exclaimed, "No, no, I will hear Mr. Finch. Go on: my Lords the Bishops shall not say of me that I would not hear their counsel. I have been already told of being counsel against them," Acquittal
for want of
evidence
prevented
by the in-
discretion
of one of
the coun-
sel.

CHAP. XXII. and they shall never say I would not hear counsel for them. Such a learned man as Mr. Finch must have something material to offer. He shall not be refused to be heard by me, I assure you. Why don't you go on, Mr. Finch?"

Wright's
exultation
at the turn
of affairs.

At this critical moment it was announced that the Earl of Sunderland, the President of the Council,—who was present in the royal closet when the Bishops presented their petition to the King at Whitehall,—was at hand, and would prove a publication in Middlesex. The Chief Justice then said, with affected calmness, but with real exultation, "Well! you see what comes of the interruption. I cannot help it; it is your own fault." There being a pause while they waited for the arrival of the Earl of Sunderland, the Chief Justice, addressing Sir Bartholomew Shower,¹ one of the counsel for the Crown, whom he had stopped at an early stage of the trial, and against whom he had some private spite, he observed with great insolence, "Sir Bartholomew, now we have time to hear your speech, if you will. Let us have it."

At last the witness arrived, and, proving clearly a publication in Middlesex, the case was again launched, and, after hearing counsel on the merits, it was to be left to the determination of the jury.

Sympathy
of the
audience
with the
Bishops.

The Chief Justice, thinking to carry it all his own way, was terribly baffled, not only by the sympathy of the audience with the Bishops, which evidently made an impression on the jury, but by the unexpected honesty of one of his brother judges, Mr. Justice John Powell,² who had been a quiet man, unconnected with

1. Sir Bartholomew Shower, an English lawyer under the reign of James II., was a native of Exeter. He became Recorder of London, and published a work entitled "Cases in Parliament Resolved."—*Thomas' Biog. Diet.*

2. He was the son of John Powell, of Kenward in Carmarthenshire, and was born about 1633. The inscription on his monument states that he received his first instructions from Jeremy Taylor, the renowned Bishop

politics, and, being a profound lawyer, had been appointed to keep the Court of King's Bench from falling into universal contempt. Sir Robert Sawyer beginning to comment upon a part of the Declaration which the Bishops objected to, "that from henceforth the execution of all laws against nonconformity to the religion established, or the exercise of any other religion, should be suspended," Wright, C. J., exclaimed, "I must not suffer this; they intend to dispute the King's power of suspending laws." *Powell, J.*: "My Lord, they must necessarily fall upon the point; for, if

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Contest between
Chief Justice
Wright
and Justice
Powell.

of Down, and subsequently at the University of Oxford, but Anthony Wood does not name him as taking any degree. His legal education commenced in 1650, at Gray's Inn, where he was called to the bar seven years after, and became an ancient in 1676. We have no detail of his professional experience till his nomination as a Judge of the Common Pleas on April 26, 1686, when he was knighted. He was removed to the King's Bench on April 16, 1687. Sir Robert Wright, a few days after Powell's appointment to the King's Bench, was restored to that court as its chief, and Powell was therefore an unfortunate and unwilling participant in the outrageous sentence on the Earl of Devonshire, fining him in the sum of 30,000*l.*, and committing him to prison till it was paid. It must be acknowledged that when called upon by the House of Lords after the Revolution to account for this breach of privilege he made a very lame excuse. The Lords overlooked the offence, and contented themselves with voting the committal to be a breach of privilege, and the fine to be excessive. On June 29, 1688, came on the trial of the Seven Bishops, and the remarks made by Sir John Powell during its progress sufficiently indicated his opinion of the prosecution, and must have prepared his colleagues for the exposition of the law which he pronounced when his turn came. He declared that he could not see anything of sedition or any other crime fixed upon the reverend fathers, for they had with humility and decency submitted to the King not to insist on their reading his Majesty's declaration, because they conceived that it was against the law of the land, it being founded on the dispensing power, which, he boldly said, if "once allowed of, there will need no parliament." The consequence of this honest demonstration, and of Justice Holloway's concurrence in it, was the Bishops' acquittal, and the dismissal of both these judges, which took place on July 7, Sir Thomas Powell being substituted for Sir John in the King's Bench. On King William's government being established, Sir John Powell was immediately restored to his original seat in the Common Pleas, a place which he preferred to the more prominent one of Keeper of the Great Seal, which, according to his epitaph, was offered to him. He was sworn in on March 11, 1689, and for the next seven years he administered justice in that court with undiminished reputation. He died at Exeter on September 7, 1696.—*Foss's Lives of the Judges.*

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the King hath no such power (as clearly he hath not, in my judgment), the natural consequence will be that this Petition is no diminution of the King's regal power, and so not seditious or libellous." *Wright, C. J.*: "Brother, I know you are full of that doctrine; but, however, my Lords the Bishops shall have no occasion to say that I deny to hear their counsel. Brother, you shall have your will for once; I will hear them: let them talk till they are weary." *Powell, J.*: "I desire no greater liberty to be granted them than what, in justice, the Court ought to grant: that is, to hear them in defence of their clients."

Wright's
contest
with Pem-
berton.

As the speeches for the defendants proceeded, and were producing a great effect upon all who heard them, the Solicitor General made a very irregular remark, accompanied by a fictitious yawn—"We shall be here till midnight." The Chief Justice, instead of reprimanding him, chimed in with his impertinence, saying, "They have no mind to have an end of the cause, for they have kept it up three hours longer than they need to have done." *Sergeant Pemberton*: "My Lord, this case does require a great deal of patience." *Wright, C. J.*: "It does so, brother, and the Court has had a great deal of patience; but we must not sit here only to hear speeches." In trying to put down another counsel, who was making way with the jury, he observed, "If you say anything more, pray let me advise you one thing—don't say the same thing over and over again; for, after so much time spent, it is irksome to all company, as well as to me."

Doctrines
of a rene-
gade
Whig.

When it came to the reply of Williams, the renegade Solicitor General, who in his day had been "a Whig and something more," he laid down doctrines which called forth the reprobation of Judge Powell, and even shocked the Chief Justice himself, for he denied that any petition could lawfully be presented

to the King except by the Lords and Commons in parliament assembled. *Powell, J.*: "This is strange doctrine. Shall not the subject have liberty to petition the King but in parliament? If that be law, the subject is in a miserable case." *Wright, C. J.*: "Brother, let him go on; we will hear him out, though I approve not of his position." The unabashed Williams continued, "The Lords may address the King in parliament, and the Commons may do it; but therefore that the Bishops may do it out of parliament, does not follow. I'll tell you what they should have done: if they were commanded to do anything against their consciences, they should have acquiesced till the meeting of the parliament." (Here, says the Reporter, the people in court hissed.) *Attorney General*: "This is very fine indeed! I hope the Court and the jury will take notice of this carriage." *Wright, C. J.*: "Mr. Solicitor, I am of opinion that the Bishops might petition the King; but this is not the right way. If they may petition, yet they ought to have done it after another manner; for if they may, in this reflective way, petition the King, I am sure it will make the government very precarious." *Powell, J.*: "Mr. Solicitor, it would have been too late to stay for a parliament, for the act they conceived to be illegal was to be done forthwith; and if they had petitioned and not shown the reason why they could not obey, it would have been looked upon as a piece of sullenness, and for that they would have been as much blamed on the other side."

The Chief Justice, to put on a semblance of impartiality, attempted to stop Sir Bartholomew Shower, who wished to follow in support of the prosecution, and, being a very absurd man, was likely to do more harm than good. *Wright, C. J.*: "I hope we shall have done by and by." *Sir B. S.*: "If your Lordship don't

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Sir Bartholomew Shower in support of the prosecution.

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think fit, I can sit down." *Wright, C. J.*: "No! no! Go on, Sir Bartholomew—you'll say I have spoiled a good speech." *Sir B. S.*: "I have no good speech to make, my Lord; I have but a very few words to say." *Wright, C. J.*: "Well, go on, Sir; go on."

In summing up to the jury, the Chief Justice said:

The Chief
Justice
sums up to
the jury.

"This is a case of very great concern to the King and the Government on the one side, and to my Lords the Bishops on the other. It is an information against his Grace my Lord of Canterbury and the other six noble Lords, for composing and publishing a seditious libel. At first we were all of opinion that there was no sufficient evidence of publication in the county of Middlesex, and I was going to have directed you to find my Lords the Bishops *not guilty*; but it happened that, being interrupted in my direction by an honest, worthy, learned gentleman, the King's counsel took the advantage, and, informing the Court that they had further evidence, we waited till the Lord President came, who told us how the Petition was presented by the right reverend defendants to the King at Whitehall. Then came their learned counsel and told us that my Lords the Bishops are guardians of the Church, and great peers of the realm, and were bound in conscience to act as they did. Various precedents have been vouched to show that the kings of England have not the power assumed by his present Majesty in issuing the Declaration and ordering it to be read; but concessions which kings sometimes make, for the good of the people, must not be made law; for this is reserved in the King's breast to do what he pleases in it at any time. The truth of it is, the dispensing power is out of the case, and I will not take upon me to give any opinion upon it now; for it is not before me. The only question for you is a question of fact, whether you are satisfied that this Petition was presented to the King at Whitehall. If you disbelieve the Lord President, you will at once acquit the defendants. If you give credit to his testimony, the next consideration is, whether the Petition be a seditious libel, and this is a question of law on which I must direct you. Now, gentlemen, anything that shall disturb the government, or make mischief and a stir among the people, is certainly within the case '*De Libellis Famosis*;' and I must, in short, give you my opinion, I do take it to be a libel. But this



MAGDALENE COLLEGE, OXFORD.
Inner Quadrangle.



being a point of law, if my brothers have anything to say to it, I suppose they will deliver their opinions,"

Mr. Justice Holloway,¹ though a devoted friend of the Government, had in his breast some feeling of shame, and observed,—

“If you are satisfied there was an ill intention of sedition or Helloway, the like, you should find my Lords the Bishops *guilty*; but if they only delivered a petition to save themselves harmless, and to free themselves from blame, by showing the reason of their disobedience to the King’s command, which they apprehend to be a grievance to them, I cannot think it a libel.” *Wright, C. J.*: “Look you, by the way, brother, I did not ask you to sum up the evidence (for that is not usual), but only to deliver your opinion whether it be a libel or no.” *Powell, J.*: “Truly, I *Powell*, cannot see, for my part, anything of sedition or any other crime fixed upon these reverend fathers. For, gentlemen, to make it a libel, it must be false, it must be malicious, and it must tend to sedition. As to the falsehood, I see nothing that is offered by the King’s counsel, nor anything as to the malice: it was presented with all the humility and decency becoming subjects when they approach their prince. In the Petition they say, because they conceive the thing that was commanded them to

1. Richard Holloway was the son of John Holloway. He became a Fellow of New College, Oxford, and, though admitted a member of the Inner Temple on February 7, 1634, was not called to the bar till November 24, 1658. In July, 1667, he was created a Sergeant, and Luttrell (i. 260) calls him King's Sergeant in June, 1683, when he was knighted, and on September 25 of the same year he was constituted a Judge of the King's Bench. In the following November he was engaged in the trial of Algernon Sidney in that court, but took no active part in it, and in the other public trials of Charles's reign his conduct was irreproachable. After the accession of James II. he concurred in the deserved but illegal sentence pronounced against the infamous Titus Oates, and in the excessive fine of 30,000*l.* imposed upon the Earl of Devonshire for an assault upon Colonel Culpepper in the King's palace, overruling his Lordship's plea of privilege; and for both these judgments he and the other members of the court were called before Parliament after the Revolution, when the latter was declared a breach of privilege, and so much of the former as remained to be inflicted was remitted by the King. The judges were, however, permitted to depart unscathed. But having in the great case as to the King's power to dispense with the penal laws acquiesced in the judgment in favor of the Crown, he and all who survived were excepted out of the bill of indemnity passed in 2 William III.—*Foss's Lives of the Judges.*

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be against the law of the land, therefore they do desire his Majesty that he would be pleased to forbear to insist upon it. If there be no such dispensing power, there can be no libel in the Petition which represented the Declaration founded on such a pretended power to be illegal. Now, gentlemen, this is a dispensation with a witness; it amounts to an abrogation and utter repeal of all the laws; for I can see no difference, nor know of any in law, between the King's power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no parliament; all the legislature will be in the King—which is a thing worth considering—and I leave the issue to God and your own consciences."

Allibone, however, on whom James mainly relied, foolishly forgetting the scandal which would necessarily arise from the Protestant prelates being condemned by a Popish judge for trying to save their Church from Popery, came up to the mark, and, in the sentiments he uttered, must have equalled all the expectations entertained of him by his master:

Allibone.

"In the first place," said he, "no man can take upon him to write against the actual exercise of the Government, unless he have leave from the Government. If he does, he makes a libel, be what he writes true or false; if we once come to impeach the Government by way of argument, it is argument that makes government or no government. So I lay down, that the Government ought not to be impeached by argument, nor the exercise of the Government shaken by argument. Am I to be allowed to discredit the King's ministers because I can manage a proposition, in itself doubtful, with a better pen than another man? This I say is a libel. My next position is, that no private man can take upon him to write concerning the Government at all, for what has any private man to do with the Government? It is the business of the Government to manage matters relating to the Government; it is the business of subjects to mind only their private affairs. If the Government does come to shake my particular interest, the law is open for me, and I may redress myself; but when I intrude myself into matters which do not concern my particular interest, I am a libeller. And, truly, the attack is the worse if under a specious pretence;

for, by that rule, every man that can put on a good vizard may be as mischievous as he will, so that whether it be in the form of a supplication, or an address, or a petition, let us call it by its true denomination, it is a libel." He then examined the precedents which had been cited, displaying the grossest ignorance of the history as well as constitution of the country; and, after he had been sadly exposed by Mr. Justice Powell, he thus concluded: "I will not further debate the prerogatives of the Crown, or the privileges of the subject; but I am clearly of opinion that these venerable Bishops did meddle with that which did not belong to them; they took upon themselves to contradict the actual exercise of the Government, which I think no particular persons may do."

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The Chief Justice, without expressing any dissent, merely said, "Gentlemen of the jury, have you a mind to drink before you go?" So wine was sent for, and they had a glass apiece; after which they were marched off in custody of a bailiff, who was sworn not to let them have meat or drink, fire or candle, until they were agreed upon their verdict.

All that night were they shut up, Mr. Arnold, the King's brewer, standing out for a conviction till six next morning, when, being dreadfully exhausted, he was thus addressed by a brother jurymen: "Look at me; I am the largest and the strongest of the twelve, and, before I find such a petition as this a libel, here I will stay till I am no bigger than a tobacco-pipe."

Delibera-
tion of the
jury.

The Court sat again at ten, when the verdict of NOT GUILTY was pronounced, and a shout of joy was raised which was soon reverberated from the remotest parts of the kingdom. One gentleman, a barrister of Gray's Inn, was immediately taken into custody in court, by order of the Lord Chief Justice, who, with an extraordinary command of temper and countenance, said to him in a calm voice, "I am as glad as you can be that my Lords the Bishops are acquitted, but your manner of rejoicing here in court is indecent; you

June 30.
The ver-
dict.

CHAP. might rejoice in your chamber or elsewhere, and not
XXII. here. Have you any thing more to say to my Lords
the Bishops, Mr. Attorney?" *A. G.*: "No, my Lord."
Wright, C. J.: "Then they may withdraw,"—and they
walked off, surrounded by countless thousands, who
eagerly knelt down to receive their blessing.¹

July 7.
Wright in
danger of
being dis-
missed.

Reason
why he was
not dis-
missed.

Justice Holloway was forthwith cashiered, as well
as Justice Powell; and there were serious intentions
that Chief Justice Wright should share their fate, as
the King ascribed the unhappy result of the trial
to his pusillanimity,—contrasting him with Jeffreys,
who never had been known to miss his quarry. This
esteemed functionary held the still more important
office of Lord High Chancellor, and, compared with
any other competitor, Wright, notwithstanding his
occasional slight lapses into conscientiousness, ap-
peared superior in servility to all who could be sub-
stituted for him.² Allibone was declared to be "the
man to go through thick and thin;" but, unfortunately,
he had made himself quite ridiculous in all men's eyes
by the palpable blunders he had recklessly fallen into
during the late trial; and he felt so keenly the disgrace
he had brought on himself and his religion, that he
took to his bed and died a few weeks afterwards.

Nov. 5.

Thus, when William of Orange landed at Torbay,³

1. 1 St. Tr. 183-523.

2. It was supposed that he was jealous of Williams, the Solicitor General, who had been promised by James the highest offices of the law if he could convict the Bishops. This may account for a sarcasm he levelled at his rival during the trial. Williams, having accounted for a particular vote of the House of Commons in the reign of James II., when he himself was a member and suspected of bribery, said "there was a lump of money in the case." Wright, in referring to this, observed, "Mr. Solicitor tells you the reason, 'there was a lump of money in the case;' but I wonder, indeed, to hear it come from him." Williams, understanding the insinuation, exclaimed, "My Lord, I assure you I never gave my vote for money in my life."

3. Torbay is on the southern coast of England, east of Plymouth. William landed where the quay of Brixham now stands. The whole aspect of the place has been altered. Where we now see a port crowded

Wright still filled the office of Chief Justice of the King's Bench. He continued to sit daily in court till the flight of King James,—when an interregnum ensued, during which all judicial business was suspended, although the public tranquillity was preserved, and the settlement of the nation was conducted by a provisional government.¹ After Jeffreys had tried to make his escape, disguised as a sailor, and was nearly torn to pieces by the mob, Wright concealed himself in the house of a friend, and, being less formidable and less obnoxious (for he was called the "*jackal* to the *lion*"), he remained some time unmolested; but upon information, probably ill-founded, that he was conspiring with papists who wished to bring back the King, a warrant was granted against him by the Privy Council, on the vague charge of "endeavoring to subvert the Government." Under this he was apprehended, and carried to the Tower of London; but, after he had been examined there by a committee of the House of Commons, it was thought that this custody was too honorable for him, and he was ordered to be transferred to Newgate. Here, from the perturbation of mind which he suffered, he was seized with a fever, and he died miserably a few days after, being deafened by the cheers which were uttered when the Prince and Princess of Orange were declared King and Queen of England.²

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Dec. 11.

Fate of
Wright at
the Revolution.He dies in
Newgate.

Feb. 1689.

His pecuniary embarrassments had continued even

with shipping, and a market-place swarming with buyers and sellers, the waves then broke on a desolate beach; but a fragment of the rock on which the deliverer stepped from his boat has been carefully preserved, and is set up as an object of public veneration in the centre of that busy wharf.—*Macaulay's England*, vol. ii. p. 144.

1. Westminster Hall was closed during the whole of Hilary Term, 1689, and an act was afterwards passed for reviving actions and continuing process (1 W. & M. c. 4).

2. Some accounts say that he was dangerously ill of a fever at the time of his removal from the Tower.

CHAP. XXII. after he became a Judge, and, still living extravagantly, his means were insufficient to supply him with common comforts in his last hours, or with a decent burial. His end holds out an awful lesson against early licentiousness and political profligacy. He was almost constantly fighting against privation and misery, and during the short time that he seemed in the enjoyment of splendor he was despised by all good men, and he must have been odious to himself. When he died, his body was thrown into a pit with common malefactors; his sufferings, when related, excited no compassion; and his name was execrated as long as it was recollected.

He is
buried with
felons.

Proceed-
ings
against
him in par-
liament
after his
death.

The Convention Parliament, not appeased by his ignominious death, still wished to set a brand upon his memory. At first there was an intention of attainting him, as well as Jeffreys, who, about the same time, had come to a similar end. In the debate on the Indemnity Act, Sir Henry Capel said,—

“Will you not except the bloody Judges, and those who were of opinion for the dispensing power?” *Mr. Boscawen*: “Although the capital offenders are dead, I would have them attainted. Begin with Chancellor Jeffreys, reduce his estate to the same condition as when he began to offend, and let his posterity be made incapable to sit in the Lords’ House.” *Mr. Hawles*: “If you except a man that is dead, you will find the Chancellor very little more guilty than those who supported the dispensing power. The dispensing power was the last grievance, and a bloody sacrifice to the Prince’s pleasure.”

It was resolved first to specify the offences which should exclude from the benefit of the Act of Indemnity, and these were agreed upon: “1. Asserting, advising, and promoting the dispensing power and suspending of laws without consent of parliament. 2. The prosecution of the Seven Bishops. 3. Sitting in the Court of High Commission.”—Powell, Atkyns,

Holloway, and other Judges who had been dismissed, were examined at the bar, and the part that Wright had taken in the illegal proceedings of the last reign was clearly established. Sir Robert Sawyer, then Attorney General, now a member of the House, likewise made some terrible disclosures (which led to his own expulsion) relating to the manner in which the King, the Chancellor, and the Chief Justice had combined to obtain the concurrence of the other Judges in illegal decisions. Finally, Sir Thomas Clarges alone stood up for Wright, saying, "If any fact he hath done amounts to felony or treason, make his estate forfeitable, and I am for it; but where there is no offence in law, I would not have him excepted; and as he has gone to another world, and left no estate behind him, let him rest in peace." But Sir Thomas Littleton¹ closed the debate by observing, in a very fierce tone, "We may not be able to touch his person or his property, but it would be an ill thing for such a man to stand in our chronicles with no mark upon him." So it was resolved "that Sir Robert Wright be excepted."²

And surely we have reason to admire the good

1. Sir Thomas Littleton (1647?-1710), Speaker of the House of Commons and Treasurer of the Navy, was the younger son of Sir Thomas Littleton, second baronet, of Stoke St. Milborough, Shropshire, and North Ockendon, Essex, and of Anne, daughter of Edward, Lord Littleton. He entered at the Inner Temple in 1671, and succeeded to the baronetcy on the death of his father ten years later. It was he, and not his father, with whom Macaulay confuses him, who was chosen one of the "managers" for the Commons in the conference with the House of Lords on the form of words to be used in declaring the throne vacant. According to Boyer, "he acquitted himself with much applause." In December, 1693, Littleton was elected Speaker of the Commons. His weak health prevented him from proving a very efficient Speaker, and his occupation of the chair ceased at the dissolution in 1700. In the next parliament he succeeded Harley, the new Speaker, as Treasurer of the Navy, and held that office until his death. He was the means of introducing useful reforms into his department.—*Stephen's Nat. Biog.*

2. 5 Parl. Hist. 260, 263, 278, 308, 312, 318, 324, 334, 339; stat. 2 W. & M., sess. 1, c. 10; Granger, 311; Macaulay, ii. 275.

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Wright
fortunate
in having
Jeffreys
and
Scroggs as
contempo-
raries.

Utility of
exhibiting
the abuses
of govern-
ment
which led
to the Rev-
olution.

sense and moderation which characterized the proceedings of the Convention Parliament in this as well as in almost every other deliberation. We are shocked by reading, in the criminal annals of Scotland, of a skeleton being set up at the bar of a court of justice to receive sentence,—and the insult offered, on the restoration of Charles II., to the remains of Cromwell and Blake, was disgraceful to the English nation; but the simple expression of censure by the legislature of the country upon this deceased delinquent harmonizes with our best feelings, and, without inflicting hardship on any individual, was calculated to make a salutary impression upon future judges. It is lucky for the memory of Wright that he had contemporaries such as Jeffreys and Scroggs, who considerably exceeded him in their atrocities. Had he run the same career in an age not more than ordinarily wicked, his name might have passed into a byword, denoting all that is odious and detestable in a judge; whereas his misdeeds have long been little known, except to lawyers and antiquaries.

It is a painful duty for me to draw them from their dread abode; but let me hope that, by exposing them in their deformity, I may be of some service to the public. Ever since the reaction which followed the passing of the Reform Bill, there has been a strong tendency to mitigate the errors and to lament the fate of James II. This has shown itself most alarmingly among the rising generation, and there seems reason to dread that we may soon be under legislators and ministers who, believing in the divine right of kings, will not only applaud, but act upon, the principles of arbitrary government.¹ Some good may arise from

1. When, in the debating societies at Eton, Oxford, and Cambridge, the question has been put to the vote "whether the Revolution of 1688 was justifiable," it has generally been carried by an immense majority in the negative.

showing in detail the practical results of such principles in the due administration of justice—the chief object, it has been said, for which man renounces his natural rights, and submits to the restraints of magisterial rule.

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I rejoice to think that I am now parting with the last of the monsters who, disguised as judges, shed innocent blood, and conspired with tyrants to overturn all the free institutions which have distinguished and blessed our country. For the purpose of showing the manner in which the laws had been perverted to the oppression of the subject, I may conclude with asking the reader to take a retrospective glance at the last two Stuart reigns, and to observe that during a period of only twenty-eight years there had been a series of not fewer than eleven Chief Justices of the Court of King's Bench, most of whom had been selected for their supposed subserviency, and several of whom were cashiered because, notwithstanding their eager desire to comply with the wishes of the Government, judgments had been required of them which they could not give without infamy, but which were given by their more infamous substitutes. The other judicial seats had been equally prostituted,—insomuch that although, on the establishment of the constitutional government under William and Mary, there was no indisposition to continue in office any of the old Judges who were decently competent by acquirements and character, it was found necessary to make a complete sweep of all actually officiating in the Court of Chancery, in the Court of King's Bench, in the Court of Common Pleas, and in the Court of Exchequer. Even of the Judges who had been dismissed as refractory, Sir Robert Atkyns and Mr. Justice John Powell alone could with propriety be reappointed. The others, condemned for independence by James II., would have been shunned,

A retrospective
glance at
the last
two Stuart
reigns.

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from the dread of contamination, by the pure and enlightened men subsequently appointed to adorn the seat of justice, which the least culpable of their predecessors, with unpardonable although with faltering and imperfect profligacy, had disgraced.¹

1. The reader may like to see a list of the Judges immediately before and after the Revolution :

JAMES II.	WILLIAM AND MARY.
<i>Lord Chancellor.</i>	<i>Lords Commissioners of the Great Seal.</i>
Lord Jeffreys.	Sir John Maynard.
	Sir Anthony Keck.
	Sir William Rawlinson.
<i>Master of the Rolls.</i>	<i>Master of the Rolls.</i>
Sir John Trevor.	Henry Powle, Esq.
<i>King's Bench.</i>	<i>King's Bench.</i>
Sir Robert Wright.	Sir John Holt.
Sir Thomas Powell.	Sir William Dolben.
Sir Robert Baldock.	Sir William Gregory.
Sir Thomas Stringer.	Sir Giles Eyre.
<i>Common Pleas.</i>	<i>Common Pleas.</i>
Sir Edward Herbert.	Sir Henry Pollexfen.
Sir Thomas Street.	Sir John Powell.*
Sir Thomas Jenner.	Sir Thomas Rokeby.
Sir Edward Lutwyche.	Sir Peyton Ventris.
<i>Exchequer.</i>	<i>Exchequer.</i>
Sir Robert Atkyns.	Sir Robert Atkyns.*
Sir Richard Heath.	Sir Nicholas Letchmere.
Sir Charles Ingleby.	Sir Edward Neville.
Sir John Rothram.	Sir John Turton.

* Old Judges reappointed.

CHAPTER XXIII.

LIFE OF LORD CHIEF JUSTICE HOLT, FROM HIS BIRTH
TILL THE COMMENCEMENT OF HIS CONTESTS WITH
THE TWO HOUSES OF PARLIAMENT.

THE unprincipled, ignorant, and incompetent Chief Justices of the King's Bench, who have been exciting alternately the indignation and the disgust of the reader, were succeeded by a man of unsullied honor, of profound learning, and of the most enlightened understanding, who held the office for twenty-two years,—during the whole of which long period—often in circumstances of difficulty and embarrassment—he gave an example of every excellence which can be found in a perfect magistrate. To the happy choice of SIR JOHN HOLT as president in the principal common-law court, and to his eminent judicial services, we may in no small degree ascribe the stability of the constitutional system introduced when hereditary right was disregarded, and the dynasty was changed. During the reigns of William and of Anne, factions were several times almost equally balanced, and many of the enormities of the banished race were forgotten; but when men saw the impartiality and mildness with which Chief Justice Holt conducted the trial of Lord Preston, who was undoubtedly guilty of high treason, and the firmness with which, in the discharge of his duty, he alternately defied the power of either House of Parliament, they dreaded a counter-revolution, by which he would have been removed to make place for a Jeffreys, a Scroggs, or a Wright.

CHAP.
XXIII.

Services
and char-
acter of
Sir John
Holt.

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XXIII.
His repu-
tation the
highest of
all English
Judges.

Of all the Judges in our annals, Holt has gained the highest reputation, merely by the exercise of judicial functions. He was not a statesman like Clarendon, he was not a philosopher like Bacon, he was not an orator like Mansfield; yet he fills nearly as great a space in the eye of posterity; and some enthusiastic lovers of jurisprudence regard him with higher veneration than any English Judge who preceded or has followed him.

It would have been most interesting and instructive to trace the formation of such a character, but, unfortunately, little that is authentic is known of Holt till he appeared in public life; and for his early career we are obliged to resort to vague and improbable traditions.

His father. He was of a respectable gentleman's family, seated in the county of Oxford.¹ His father tried, rather unsuccessfully, to eke out the income arising from a small patrimonial estate, by following the profession of the law, and rose to be a bencher of Gray's Inn. In 1677 he became a Sergeant, but was known by mixing in factious intrigues rather than by pleading causes in Westminster Hall. Of the party who were first called "*Tories*"² he was one of the founders. Taking the

A "Tory"
and an
"Ab-
horrer."

1. I have taken the following account of Ch. J. Holt's family, and the dates of the different events in his early career, from a *Life* of him published in the year 1763, with the motto from his epitaph—

"Libertatis, ac Legum Anglicarum
Assertor, Vindex, Custos,
Vigilis, Acer, et Intrepidus."

["He was the advocate, champion, and guardian of Liberty and the Laws of England, ever watchful, zealous, and undaunted."] This, as a biography, is exceedingly meagre, but it seems very accurate, and it cites authorities, most of which I have investigated, but which I do not think it worth while to parade. See likewise an able *Life* of Holt in Welsby's "*Eminent English Judges*," which has been of considerable service to me in preparing this memoir.

2. Origin of the terms "*Whig*" and "*Tory*."—At this time (1679) were first heard the two nicknames which, though originally given in insult, were soon assumed with pride, which are still in daily use, which have spread as widely as the English race, and which will last as long as



SIR BARTHOLOMEW SHOWER.



Court side with much zeal, he was rewarded with knighthood, and became "Sir Thomas." Of course he was an "Abhorrer,"¹ inveighing against the "Petitioners" as little better than traitors—in consequence of which he was taken into custody by order of the House of Commons. His celebrated son had strongly taken the other side in politics—but was no doubt shocked at this stretch of authority, and may then have imbibed the dislike which he afterwards evinced

the English literature. It is a curious circumstance that one of these nicknames was of Scotch and the other of Irish origin. Both in Scotland and in Ireland misgovernment had called into existence bands of desperate men, whose ferocity was heightened by religious enthusiasm. In Scotland, some of the persecuted Covenanters, driven mad by oppression, had lately murdered the Primate, had taken arms against the Government, had obtained some advantages against the King's forces, and had not been put down till Monmouth, at the head of some troops from England, had routed them at Bothwell Bridge. These zealots were most numerous among the rustics of the western lowlands, who were vulgarly called Whigs. Thus the appellation of Whig was fastened on the Presbyterian zealots of Scotland, and was transferred to those English politicians who showed a disposition to oppose the Court and to treat Protestant Nonconformists with indulgence. The bogs of Ireland at the same time afforded a refuge to Popish outlaws, much resembling those who were afterwards known as Whiteboys. These men were then called Tories. The name of Tory was therefore given to Englishmen who refused to concur in excluding a Roman Catholic prince from the throne.—*Macaulay's History*. Professor Pryme, who represented Cambridge University and was Chairman of Committees, says, in his "Recollections": "O'Connell showed me in the library of the House of Commons, as an illustration of the name of Tory, an Irish act of Parliament for the suppression of 'Raparees, Tories, and other Robbers.' The appellation of Whig, as well as Tory, was also a nickname, and given by the opposite party in allusion to sour milk."—*Jennings' Anc. Hist. Brit. Parl.* (Am. Ed.) 42.

1. "Abhorers" (1679) was the name given to the adherents of the Court party, who, on petitions being presented to the King, praying him to summon Parliament for January, 1680, signed counter-petitions, expressing *abhorrence* for those who were attempting to encroach on the royal prerogative. It is said that the names Whig and Tory, as party designations, were first used in the disputes between the Petitioners and Abhorers. "Petitioners" (1679) was the name given to those members of the Opposition, or "country" party, who in this year presented petitions to Charles II. asking him to summon a Parliament in January, 1680. Their opponents presented counter-petitions, expressing *abhorrence* of the attempt to encroach on the royal prerogative, and were hence called *Abhorers*.—*Low and Pulling's Dict. of Eng. Hist.*

CHAP. XXIII. of the abuse of parliamentary privilege. The old gentleman soon after died, and if he had been childless his name never more would have been heard of.

A. D. 1642.
Holt's
birth. But on the 30th of December, 1642, there had been born to him at Thame, in Oxfordshire, a son, the subject of this memoir, whom he lived to see rising into great eminence, and of whom he was justly proud, although he deplored his political degeneracy when he found him to be a Whig.

At school. All that we certainly know of young John's boyish education is that he was seven or eight years at the Free School of the town of Abingdon, of which his father was Recorder. It is said, that during the whole of this time he was remarkable for being idle and mischievous—a statement which I entirely disbelieve. "The boy is the father of the man," and though there may be a supervening habit of dissipation—which may be conquered—the devoted application to business, the unwearied perseverance, and the uniform self-control which characterized Sir John Holt, could only have been the result of a submission to strict discipline in early youth.

A. D. 1658. In his sixteenth year he was transferred to the University of Oxford, and entered a fellow-commoner of Oriel College. Here he was guilty of great irregularities, although they have been probably much exaggerated, and might arise from his having been previously kept under excessive restraint. His biographers represent him as copying Henry V. when the associate of Falstaff, and not only indulging in all sorts of licentious gratifications, but actually being in the habit of taking purses on the highway. They even relate that many years after, when he was going the circuit as Chief Justice, he recognized a man, convicted capitally before him, as one of his own accomplices in a robbery, and that, having visited him in jail and inquired after

His early
excesses.

the rest of the gang, he received this answer, "Ah! my Lord, they are all hanged but myself and your Lordship!"¹

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Another story of his juvenile extravagance is well told by my friend Mr. Welsby :

"Having prolonged one of his unlicensed rambles round the country, in company with some associates as reckless as himself, until their purses were all utterly exhausted, it was determined, after divers consultations how to proceed, that they should part company, and try to make their way singly, each by the exercise of his individual wits. Holt, pursuing his separate route, came to the little inn of a straggling village, and, putting the best face upon the matter, commended his horse to the attentions of the hostler, and boldly bespoke the best supper and bed the house afforded. Strolling into the kitchen, he observed there the daughter of the landlady, a girl of about thirteen years of age, shivering with a fit of the ague; and on inquiring of her mother how long she had been ill, he was told nearly a year, and this in spite of all the assistance that could be had for her from physicians, at an expense by which the poor widow declared she had been half ruined. Shaking his head with much gravity at the mention of the doctors, he bade her be under no further concern, for she might assure herself her daughter should never have another fit: then scrawling a few Greek characters upon a scrap of parchment, and rolling it carefully up, he directed that it should be bound upon the girl's wrist, and remain there till she was well. By good luck, or possibly from the effect of imagination, the ague returned no more, at least during a week for which Holt remained their guest. At the end of that time, having demanded his bill with as much confidence as if

He acts the part of a wizard.

1. Hanging was not formerly considered so very disgraceful and melancholy an occurrence as it is now. When I first came to London I frequented the famous CIDER CELLAR in *Maiden Lane*, where I met Professor Porson, Matthew Raine, the Master of the Charter-house, and other men of celebrity. Among these was George Nichol, the King's bookseller, who, in answer to some reflections on the society who sometimes came there, answered, with an air of conscious dignity, "I have known the Cider Cellar these forty years, and during that time only two men have been hung out of it." At this time the Cellar was repaired, and Porson suggested for it the motto which it still bears—

"HONOS ERIT HUC QUOQUE FOMU."

["There will be honor also for this fruit."]

CHAP. his pockets were lined with jacobuses, the delighted hostess,
XXIII. instead of asking for payment, bewailed her inability to pay *him* as she ought for the wonderful cure he had achieved, and her ill fortune in not having lighted on him ten months sooner, which would have saved her an outlay of some forty pounds. Her guest condescended, after much entreaty, to set off against his week's entertainment the valuable service he had rendered, and wended merrily on his way. The sequel of the story goes on to relate, that when presiding, some forty years afterwards, at the assizes of the same county, a wretched decrepit old woman was indicted before him for witchcraft, and charged with being in possession of a spell which gave her power to spread diseases among the cattle, or cure those that were diseased. The Chief Justice desired that this formidable implement of sorcery might be handed up to him; and there, enveloped in many folds of dirty linen, he found the identical piece of parchment with which he had himself played the wizard so many years before. The mystery was forthwith expounded to the jury; it agreed with the story previously told by the prisoner; the poor creature was instantly acquitted, and her guest's long-standing debt amply discharged."¹

Nov. 19,
1652.
He studies
law at
Gray's Inn.

A. D. 1660.

His re-
formation
in London.

He had been early destined to the profession of the law, having been entered on the books of Gray's Inn when he was only ten years old. His father was then treasurer of that society, and entitled to admit a son without a fee. Before he had completed his first year's residence at Oxford, such were his excesses, and such were the complaints which they called forth, that Sir Thomas thought the only chance of saving him from utter ruin was a change of scene, of company, and of pursuits. Accordingly he was brought to London, he was put under the care of a sober attorney, and he was required to keep his terms with a view to his being called to the bar. The experiment had the most brilliant success. His reformation was at once complete; and, without taking any vow, like Sir Matthew Hale, against stage-plays and drinking, or renouncing society to avoid temptation, he applied ardently to the

1. Lives of Eminent English Judges, p. 91.

study of the law, and his moral conduct was altogether irreproachable. CHAP. XXIII.

Unfortunately we have no particular account of the manner in which he rendered himself so consummate a jurist. "Moots" and "Readings" at the Inns of Court were going out of fashion; and the ponderous commonplace book, by which every student was expected to make out for himself a *Corpus Juris Anglicani*, was, since the publication of *ROLLE* and other compilations, thought rather a waste of labor. I suspect that, after acquiring a knowledge of practice from his attorney-tutor, young Holt improved himself chiefly by the diligent perusal of well-selected law-books, and by a frequent attendance in the courts at Westminster when important cases were to be argued. By an intuitive faculty not to be found in your mere black-letter lawyer, he could distinguish genuine law, applicable to real business, from antiquated rubbish, of no service but to show a familiarity with the *YEAR-BOOKS*.¹ He made himself master of all that is useful in our municipal code, and, from his reasoning in *Coggs v. Bernard* and in other cases, it is evident that he must have thoroughly imbued his mind with the principles of the Roman civil law. If he once took delight in classical studies, he now renounced them; and he never wandered into philosophy, or even cared much about the polite literature of his own country. But he mixed occasionally in general society, and picked up much from conversation; so that he was well acquainted with the actual business of life, and had a keen insight into character. His *mother-wit* was equal to his *clergy*.²

1. The series first printed and long known as *The Year-Books* contains cases from the beginning of the reign of Edward II. down to the end of Edward III., and from the beginning of Henry IV. down to near the end of Henry VIII.—*Century Dict.*

2. Learning.

How he rendered himself so consummate a jurist.

CHAP.
XXIII.
Feb. 27,
1663—64.
He is
called to
the bar.

Soon after he came of age he was called to the bar; a wonderful precocity in those days, when a training of seven or eight years, after taking a degree at a university, was generally considered necessary before putting on the long robe. His juvenile appearance seems to have been adverse to his success, as for some years he was still dependent on his father's bounty for his subsistence. He sought for practice in the Court of King's Bench, and rode the Oxford Circuit, but long remained without clients. Being advised to try his luck in the Court of Chancery, he expressed an unbecoming contempt for our equitable system, which certainly was then in a very crude state, and he professed a determined resolution to make his fortune by the common law.

His profes-
sional
progress.

He still read diligently, and took notes of all the remarkable cases which he heard argued. When he was at last found out, business poured in upon him very rapidly. He was noted for doing it not only with learning always sufficient, but with remarkable good sense and handiness; so that he won verdicts in doubtful cases, and was noted for having "the ear of the court." Yet he would not stoop, for victory, to any unbecoming art, and always maintained a character for straightforwardness and independence. His name frequently appears as counsel in routine cases in the King's Bench Reports about the middle of the reign of Charles II., and he was soon to gain distinction in political prosecutions which interested the whole nation.

He is a
Whig.

He always showed in domestic life much reverence, as well as affection, for his father; but on public affairs he thought for himself, and he decidedly preferred the "country party." He had regarded with horror the iniquities of the infamous CABAL, and he associated himself with those who were struggling for

the principles of civil and religious liberty. He was tainted with the rage against Popery, from which no patriot was then free; but, although a sincere member of the Church of England, he was for extending a liberal toleration to all orthodox Dissenters. With these principles, and his professional eminence, he was sure to be of service to his country in the struggles that were then going forward between the contending parties in parliament and in the courts of law.

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XXIII.

The first *cause célèbre* in which he was engaged was the impeachment of the Earl of Danby. The King, dreading the disclosures which might be made in investigating the charges against his Prime Minister, had granted him a pardon, to which with his own royal hand he had affixed the Great Seal; but the Commons, allowing that it was within the power of the prerogative to remit the sentence after it had been pronounced, denied that a pardon could be pleaded in bar of an impeachment. The Lords received the plea, and assigned Mr. Holt as counsel for the defendant to argue its validity; the understood rule then being (as had been settled in the case of the Earl of Strafford) that upon an impeachment the defendant might have the assistance of counsel on any question of law, although not to argue the merits of the accusation. The Commons were now so unreasonable as to pass a resolution "That no commoner whatsoever shall presume to maintain the validity of the pardon pleaded by the Earl of Danby, without the consent of this House first had; and that the persons so doing shall be accounted betrayers of the liberties of the Commons of England."¹ Holt remained undismayed, and would manfully have done his duty at the peril of being seized by the Sergeant-at-arms and lodged in "Little-Ease."

A.D. 1679.
He is counsel for the Earl of Danby and two of the Catholic peers charged with being concerned in the Popish Plot.

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XXIII.

But the King put an end for the present to the controversy between the two Houses by an abrupt dissolution of that Parliament which had sat seventeen years, which on its meeting was ready to make him an absolute sovereign, but which now seemed disposed to wrest the sceptre from his hand.¹

Holt was afterwards assigned by the Lords to be counsel for the Earl of Powis² and Lord Bellasis,³ two of the five Popish peers capitally impeached on the charge of being concerned in the Popish Plot, which was converted into high treason, the murder of the King being one of its supposed objects.⁴ However, the unhappy Lord Stafford was alone brought to trial, and his murder caused such a reaction in the public mind that the other intended victims were released when they seemed inevitably doomed to share his fate.

A.D. 1680.
He acts as
junior to
Jeffreys in
a prosecution
for
libel.

By one of the professional accidents to which all men at the bar are liable, from not being at liberty to refuse a retainer, Holt was next associated with Sir George Jeffreys in prosecuting a bookseller for publishing a pamphlet alleged to be libellous and seditious, because it attempted to discredit the testimony of the witnesses against those who had died as authors of the Popish Plot. There might have been a design to influence the jury by presenting before them as counsel, in support of a tale which was becoming unpopular, one who was known to have opposed it

1. 5 Parl. Hist. 1074.

2. William Herbert, Earl of Powis, an English peer who, in his youth, fought for Charles I. against the Parliament. He was regarded as the chief of the Roman Catholic aristocracy. He was sworn of the Privy Council in 1686, and, according to Macaulay, gave James II. judicious and patriotic advice.—*Thomas' Biog. Dict.*

3. John, Lord Bellasis, a Catholic peer who fought gallantly for Charles I.; after the Restoration he was rewarded with high honors and commands, but quitted them when the Test Act was passed. He was a member of the Privy Council in 1686, and appointed First Lord of the Treasury in 1687.—*Macaulay's England.*

4. 7 St. Tr. 1242, 1260.

when few had had courage to express a doubt of its most improbable fictions. CHAP.
XXIII.

Mr. Holt had merely, as junior, to open the pleadings, and was followed by his leader, who delivered a glowing panegyric on Lord Chief Justice Scroggs, and denounced all who did not believe in the Popish Plot as traitors, regretting that the present defendant was only indicted for a misdemeanor, so that his punishment could not be carried beyond fine, imprisonment, whipping, and pillory. This harangue caused such consternation that the defendant submitted to a verdict of GUILTY, although, on the part of the prosecution, they seem not to have been prepared to prove that he had published the obnoxious pamphlet.¹

In the next case in which we find Holt engaged, ^{A.D. 1683.} his duties as an advocate and his political propensities ^{He is} fully coincided: he was counsel for Lord Russell. ^{counsel for} But, in those days, a barrister had little opportunity ^{Lord Rus-} for a display of talent or zeal in the defence of persons ^{sell.} accused of high treason; for his mouth was closed, and, indeed, his capacity of advocate was not acknowledged by the Court, except when some question of law incidentally arose during the trial. During the impanelling of the jury, exception was made to one of them, on behalf of the prisoner, for not having a freehold; and the question was raised "whether it was required, either by the common law or statute, that, on trials for treason, jurymen should be freeholders?" This was very learnedly argued by Holt; but all his authorities and reasonings were overruled.² During the remainder of the trial he had to look on as a mere spectator,—while the illustrious prisoner, assisted only by an heroic woman, in vain struggled against the

1. *Rex v. Smith*, 7 St. Tr. 931.

2. The refusal of a challenge to the jurors for want of freehold was made one of the principal grounds for reversing the attainder.—9 St. Tr. 696.

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XXIII.

chicanery of the counsel for the Crown, and the brow-beating of corrupt Judges. Holt's own upright and merciful demeanor in the seat of justice may, in part, be ascribed to the horror which the closing scene of this sad tragedy was calculated to inspire.

As counsel
at the bar
he "goes
the whole
hog."

In civil cases, eager for victory, he seems not to have been very scrupulous as to the arguments he urged, but—according to the American phrase, now naturalized in Westminster Hall.—to have "gone the whole hog." Thus, in the case of the *East India Company v. Sandys*, in which the question was, whether the King's grant to the plaintiffs of an exclusive right to trade to all countries east of the Cape of Good Hope gave them a right of action against all who infringed their monopoly, he boldly argued that, although such a grant touching the Christian countries of Europe might be bad if not confirmed by Parliament, the King's subjects had no right to hold intercourse of any kind with *Infidels* without the express authority of the Crown; citing Lord Coke's doctrine that "Infidels are perpetual enemies," and the Book of Judges, which shows "how the children of Israel were perverted from the true religion by converse with the heathen nations round about, from whom they took wives and concubines."¹ On this occasion he laid himself open to the severe sarcasm of his opponent, Sir George Treby, who observed, "I did a little wonder to hear merchandising in the East Indies objected against as an unlawful trade, and did not expect so much divinity in the argument: I must take leave to say that this notion of Christians not to have commerce with infidels is a conceit absurd, monkish, fantastical, and fanatical." Jeffreys, however, was the judge, and he fully adopted the argument that the King's license alone can legalize a trading with infidels; adding sen-

How he
argued in
*East India
Company
v. Sandys*.

Jeffreys
adopts his
argument.

1. 10 St. Tr. 519; *Lives of the Chancellors*, v. 585

timents which will make true protectionists venerate his memory: "This island supported its inhabitants in many ages without any foreign trade at all, having in it all things necessary for the life of man—*Terra suis contenta bonis, non indiga mercis*.¹ And truly I think, if at this day East India commodities were absolutely prohibited, though some few traders might be mulcted of enormous gains, it would be for the general benefit of the inhabitants of this realm." So Holt had the triumph, and, I fear, was not ashamed of it; although, when he was himself on the bench, he would sooner have died than have pronounced such a judgment.²

His most creditable appearance at the bar was in the case of the *Earl of Macclesfield v. Starkey*,³ in which the question arose, "whether an action for defamation could be maintained against a grand jurymen for joining in a presentment at the assizes which charged the plaintiff and other gentlemen of the county of Chester as promoters of schism, disaffection, and infidelity, because they had signed an address to Whig members of parliament, commending the principles of that party?" Holt was for the defendant, and, in a most masterly manner, entered into the distinction between publications that are criminatory and malicious, and publications that are criminatory without being malicious; showing that no persons are to be sued for acting in the discharge of their duty with a view to the public good, although the character of individuals might thereby be prejudiced; and laying down with wonderful force the grand principle on which the legislature in our time passed the act *declaring* that the two Houses of Parliament have the right to publish whatever they deem necessary for the information of

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XXIII.

His argu-
ment in
Earl of
Maccles-
field v.
Starkey.

1. "A land satisfied with its own products, not in need of foreign commodities."

2. 10 St. Tr. 371.

3. 10 St. Tr. 1351.

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XXIII.

the community without the danger of an action or indictment against their officers. He succeeded; less, probably, from the force of his argument, than from the fact that the defendant was a violent Tory, and that the presentment was highly agreeable to the Government.

He has no
association
with
Shaftes-
bury.

Attempt to
seduce him
by James
II.

Although ever consistent and zealous in his Whig principles, Holt never associated himself with Shaftesbury, nor entered into the plots which exposed the leaders of the party to the penalties of treason; and, when James II. came to the throne, so moderate did he appear that an attempt was made to gain him over to the Court, and a hope was entertained that he might prove a useful tool in carrying on the scheme which had been deliberately concerted for the subversion of public liberty.

Feb. 1686.
He is ap-
pointed
Recorder
of London,
made
King's Ser-
geant, and
knighted.

April 22.

By the famous *QUO WARRANTO*, the charters of London had been adjudged to be forfeited, and the appointment of all the city officers was in the Crown. Sir Thomas Jenner had accordingly been made Recorder by royal mandate, without the intervention of the aldermen or the common council; and when he was promoted to be a Baron of the Exchequer, the vacant Recordership was offered to Mr. Holt. Although not unaware of the motive by which the Government was actuated, he thought he was not at liberty to refuse a judicial office, and he accepted it, fully determined, in a resolute manner, to perform its duties. He actually seemed, for a short space, to be likely to become an associate of Jeffreys, for, having taken the degree of the coif,¹ he was immediately promoted to the high dignity of King's Sergeant, and had the honor of knighthood conferred upon him. But he

1. On this occasion he gave rings with this motto—"Deus, Rex, Lex," which is noticed by Bishop Kennet as honorably distinguished from that of the last preceding batch of sergeants—"A Deo Rex, a Rege Lex," setting the King above the Law.

was soon called upon either to maintain his integrity and to sacrifice office, or really to be degraded to the level of the corrupt Judges who were ready to act according to the orders they received from the ministers of the Crown.

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XXIII.

James II. hoped to subvert the religion of the country by the exercise of his dispensing power, and its liberties by keeping up a standing army in time of peace, without the authority of parliament. All his Judges in Westminster Hall, with the exception of Baron Street, had decided that, in spite of acts of parliament requiring the oath of supremacy and the declaration against transubstantiation, he might appoint a Roman Catholic to any office, civil, military, or ecclesiastical; and all these perverters of the laws, except Chief Justice Herbert and Justice Wythens,¹

1. Francis Wythens was of a family originally settled in Cheshire, but, migrating to the south, one of them, Robert Wythens, became an alderman of London. His eldest son, Sir William, was Sheriff of Kent in 1610, and dying in 1630, his residence at Southend in the parish of Eltham was in the possession of this judge at the time of his death in 1704; but whether he inherited it as the son, or grandson, or nephew of Sir William is uncertain. He was made a Judge of the King's Bench on April 23, 1683, and concurred in the following term in the judgment against the charter of the City of London. In the other prosecutions during the life of King Charles in which he acted as one of the judges, though there is nothing harsh or violent in his observations or his language towards the parties on their trials, he was evidently, as Roger North describes him, so weak and timid a man that he had not the courage to differ from his more resolute chiefs. Consequently he assented to all the iniquitous judgments that disgraced that period, and incurred a larger share of odium than the other judges, from his being, according to the form of the court, the mouthpiece which pronounced most of the sentences. He accompanied Chief Justice Jeffreys in his bloody campaign after the Duke of Monmouth's rebellion, and continued for two years to exercise his judicial functions with his accustomed pliancy, till a sudden boldness, or a prophetic policy, prompted him to unite with Chief Justice Herbert in denying that the King could exercise martial law in time of peace without an act of Parliament. The consequence was his immediate discharge from his office on April 21, 1687, the punishment usually inflicted by King James on the slightest non-compliance with his will. Shower reports (ii. 498) that on the next day he came to Westminster Hall and practised as a Sergeant, which seems to evidence his reliance on the popularity of his decision. As this sole instance of his insubordination was too great to

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XXIII.

Jan. 1687.
He refuses
to abet the
arbitrary
measures
of the
King, and
is dis-
missed
from the
office of
Recorder.

had given an opinion that an old statute of Edward III. against desertion in time of war empowered the King to keep up, and to rule by martial law, an army raised by his own authority, at a time when he had no foreign enemy and there was profound tranquillity at home. Both these questions incidentally arose before Holt, sitting as Recorder at the Old Bailey sessions; and he firmly declared, that although the dispensing power claimed by the Crown had been applied, from ancient times, to statutes imposing pecuniary penalties given to the King, it could not extend to a statute imposing a test to protect the religion of the nation; and that although the King by his prerogative might enlist soldiers, even in time of peace, still, if there was no statute passed to punish mutiny, and to subject them to a particular discipline, they could not be punished for any military offence, and they were only amenable to the same laws as the rest of the King's subjects. The Recordership of London being, under the existing *régime*, held during the pleasure of the Crown, Holt was immediately removed from it, and was replaced by an obscure Sergeant-at-law, of the name of Tate, who had the recommendation of being ready to hold that the King of England was as absolute as the Grand Signor.

He is con-
tinued in
his office of
King's
Sergeant.

By a refinement of malice he was allowed to continue King's Sergeant, for in the state prosecutions which were impending he was thus effectually prevented from acting as counsel for the accused, while it was unnecessary to employ him for the Crown. Accordingly, he was not trusted with a brief to assist in trying to convict the Seven Bishops; and they, being deprived of his advocacy, which they would have been eager to secure, were obliged to employ *be overlooked by James, so it was too little to plead in his favor in the next reign, for he was one of the thirty-one persons who were excepted out of the Act of Indemnity.*—*Foss's Lives of the Judges.*

several counsel who were suspected to be under the influence of the Government,—and might have been betrayed, if Mr. Somers, till then unknown, had not been added to their number.¹ CHAP.
XXIII.

But Holt was summoned, in his capacity of King's A.D. 1688. Sergeant, to attend the Council assembled by the King, when it was too late, to investigate the circumstances of the birth of the Prince of Wales, and to expose the calumnious story that a supposititious child had been introduced into the Queen's bedchamber in a warming-pan. He assisted in examining the witnesses who proved so satisfactorily her pregnancy and her delivery, and in drawing up the declaration by which an ineffectual attempt was made to disabuse the public mind.

I do not find that Holt joined in the invitation to the Prince of Orange,² or that he took any active part in the revolutionary movement till after the flight of King James—when the throne, by all good Whigs, was considered vacant. He then declared that he was completely released from his allegiance to the abdicated monarch, and exerted himself to bring about a settlement which, disregarding hereditary right, should establish a constitutional monarchy, justly esteemed by him the best guarantee for true freedom.

When the Peers first met and formed a provisional Dec. 11.

1. The Diary of the second Lord Clarendon shows that Holt, as King's Sergeant, was obliged to refuse taking a brief for the plaintiff in a suit against the Queen Dowager Catherine of Braganza, although he was not employed for her. The noble diarist, not aware of professional etiquettes, seems to have been very angry; and declares that the only honest lawyers he ever met with were two "thorough Tories" like himself, Roger North and Sir Charles Porter.

2. On June 30, 1688, an invitation was sent to William of Orange to come to England at once with an armed force. It was signed by seven persons of influence—the Earl of Devonshire, one of the chiefs of the Whig party; the Earl of Shrewsbury; the Earl of Danby; Compton, Bishop of London; Henry Sidney, brother of Algernon Sidney; Lord Lamley, and Edward Russell.—*Low and Pulling's Dict. of Eng. Hist.*

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XXIII.
Holt acts
as assessor
to the
Peers.

government, as they could have no confidence in the legal advice of the Judges, Holt, with several other liberal lawyers, attended them as their assessors, and concurred in the proceedings which terminated in the Prince of Orange summoning the Convention Parliament.¹

Jan. 22,
1689.

He was not one of the members originally returned to the House of Commons on this occasion; and when the session began, as King's Sergeants had been accustomed to have a summons to the House of Lords, he took his place on the woolsack, from which the Judges were banished, and guided their Lordships in the forms to be observed in reconstructing the constitution.² But it was thought that his presence in the Lower House might be more advantageous; and Sergeant Maynard, who had been returned both for Plymouth and Beeralston, having elected to serve for the former borough, Sergeant Holt was chosen by the latter,—which was represented for a great many years by such a succession of patriotic lawyers, that we might almost be reconciled to close boroughs if the scandal caused by them could be forgotten.

He is
elected a
member of
the Con-
vention
Parlia-
ment.

Conference
between
the two
Houses on
"abdica-
tion" and
"deser-
tion."

On taking his seat, he found the controversy raging between the two Houses respecting the terms in which King James's flight should be described; the Commons having proposed the expression that "he had *abdicated* the throne," and the Lords insisting on the word "deserted." This was by no means a foolish fight about equipollent language, as it is generally described; for "abdication" was to lead to the appointment of a new occupier of the vacant throne, and "desertion" to the appointment of a regency to govern for the lineal heir. Holt was deemed a great acquisition by the "abdicationists," and he was immediately added to the committee of managers intrusted

1. 5 Parl. Hist. 19, 21, 24.

2. Lords' Journals, 5 Parl. Hist. 32.

with the duty of debating the question in *open conferences* with the opposing managers of the Lords. His speech in the Painted Chamber (almost the only specimen of his parliamentary powers) is preserved to us. He followed immediately after Mr. Somers, who had treated the subject very learnedly, and thus he proceeded:

CHAP.
XXIII.

“My Lords, I am commanded by the Commons to assist in the management of this conference. As to the first of your Lordships’ reasons for your amendment (with submission to your Lordships), I do conceive it not sufficient to alter the minds of the Commons, or to induce them to change the word ‘abdicated’ for your Lordships’ word ‘deserted.’ Your Lordships first say that ‘abdicate’ is a word not known to the common law of England. But, my Lords, the question is not so much whether it be a word as ancient as the common law, for the Commons would be justified in using it if it be a word of known and certain signification. It is derived from *dico*, an ancient Latin word, and it is frequently used by Cicero and the best Roman writers. But that it is a known English word, and of a known and certain signification with us, I will prove to you by the dictionary of our countryman Minshew. He has ‘abdicate,’ as an English word, and says that it signifies to ‘renounce,’ which is the signification which the Commons would put upon it. So that I hope your Lordships will not find fault with their using a word so ancient in itself, and with such a certain signification in the vernacular tongue. Then, my Lords, your objection that it is not a word known to the common law of England, surely cannot prevail, for your Lordships very well know we have very few words in our tongue that are of equal antiquity with the common law; your Lordships know the language of England is altered greatly in the succession of ages and the intermixture of other nations; and if we were obliged to make use only of words current when the common law took its origin, what we should deliver in such a dialect would be very difficult to be understood. Then your Lordships tell us that ‘abdication’ by the civil law is ‘a voluntary express act of renunciation.’ I do not know if your Lordships mean a *renunciation by formal deed*. If you do, I confess I know of none executed by King James before he withdrew from the realm. But, my Lords,

Holt's
speech as a
manager
for the
Commons.

CHAP.
XXIII.
Holt's
speech,
continued.

both by the civil law, and by the common law, and by common-sense, there are express acts of renunciation which are not by deed; for, if your Lordships please to observe, government is under a trust, and a deliberate violation of that trust is an express renunciation of it, although not by formal deed. How can a man in reason or sense more strongly express a renunciation of a trust than by subverting it, his actions declaring more strongly than any words spoken or written could do that he utterly renounces it? Therefore, my Lords, I can only repeat in conclusion, that the doing an act inconsistent with the being and end of a thing shall be construed a renunciation or abdication of that thing."¹

The Lords, probably, were not much convinced by such reasoning; but, finding public opinion strongly against them, and alarmed by William's threat that, if a regency should be longer struggled for, he would return to Holland, they yielded,—the throne was formally declared to be vacant, and a joint address of the two Houses was presented to the Prince and Princess of Orange, requesting them to take possession of it as King and Queen.

Feb. 13.

He takes
the oaths
to William
and Mary.

No sooner were they proclaimed than a patent was made out for Sir John Holt as their Prime Sergeant, and he took the oaths of allegiance to them. After the "Convention" had been turned into a "Parliament," he spoke only in one debate during the short time he remained a member of the House of Commons. This

Feb. 25.
His speech
in the de-
bate on the
taxes.

was on the difficult question, "what was to become of the taxes which had been voted during the life of James II.?" Sergeant Holt contended that they were still payable, as James II., though he had ceased to reign, was still alive, and that they passed with the Crown to King William and Queen Mary. He urged, with much subtlety, that the grant had been made to the Crown of England during the life of an individual, and, therefore, while this individual survived, those

1. 5 Parl. Hist. 70.

wearing the crown were entitled to the benefit of it.¹ CHAP. XXIII.
 The more prudent course, however, was adopted of making a fresh grant of the taxes to the new sovereigns.

Holt does not appear to have taken any part in framing the "Declaration of Rights" or the "Bill of Rights." I do not think that he ever would have been a great debater, or would have acquired much reputation as a statesman. The felicity of his lot proved to be, that he was placed in the situation of all others the best adapted to his natural abilities, to his acquirements, and to his character.

William and his ministers were laudably anxious to elevate to the bench the most learned and upright men that could be found in the profession of the law, the corruption and incompetency of the Judges having been one of the chief grounds on which the nation had resolved upon a change of dynasty. Great deliberation was necessary for this purpose, and fortunately there was time to devote to it. Judicial business had been entirely suspended since the late King's flight; and during Hilary Term, which ended on the 12th of February, all the courts in Westminster Hall had been closed. After many consultations,—to avoid all favoritism, the following plan was adopted: that every Privy Councillor should bring a list of the twelve persons whom he deemed the fittest to be the twelve Judges; and that the individuals who had the greatest number of suffrages should be appointed. It is a curious fact, that, howsoever the lists of the different Privy Councillors varied, they all agreed in first presenting the name of Sir John Holt;—such was his reputation for law,—such satisfaction had he given in dispensing justice when Recorder of London,—and in such respect was he held for his consistent career in William's plan for choosing the twelve Judges, Holt is appointed Chief Justice of the King's Bench, April 19.

1. 5 Parl. Hist. 140, 174.

CHAP. public life. The King willingly ratified this choice, XXIII. and when the appointment was announced in the "London Gazette" it was hailed with joy by the whole nation.¹ The new Chief Justice was sworn in before the Commissioners of the Great Seal on the 19th of April, and took his seat in the Court of King's Bench on the first day of Easter Term following.²

Westminster traditions regarding the anticipation of high judicial qualities.

According to the ancient traditions of Westminster Hall, the anticipation of high judicial qualities has been often disappointed. The celebrated advocate, when placed on the bench, embraces the side of the plaintiff or of the defendant with all his former zeal, and—unconscious of partiality or injustice—in his eagerness for victory becomes unfit fairly to appreciate conflicting evidence, arguments, and authorities. The man of a naturally morose or impatient temper, who had been restrained while at the bar by respect for the ermine, or by the dread of offending attorneys, or by the peril of being called to a personal account by his antagonist for impertinence,—when he is constituted a living oracle of the law,—puffed up by self-importance, and revenging himself for past subserviency, is insolent to his old competitors, bullies the witnesses, and tries to dictate to the jury. The sordid and selfish practitioner, who, while struggling to advance himself, was industrious and energetic, having gained the object of his ambition, proves listless and torpid, and is quite contented if he can shuffle through his work without committing gross blunders or getting into scrapes. Another, having been more laborious than discriminating, when made a judge, hunts after small or irrelevant points, and obstructs the business of his court by a

1. *Own Times*, iii. 6. At the same time he was elected a Governor of the Charter-house in the room of Lord Chancellor Jeffreys.—*Corresp. of E. of Clar.* ii. 276.

2. He was sworn a member of the Privy Council, August 25, 1689.



QUEEN MARY
After Van der Werff.



morbid desire to investigate fully and to decide conscientiously. The recalcitrant barrister, who constantly complained of the interruptions of the court, when raised to the bench forgets that it is his duty to listen and be instructed, and himself becomes a byword for impatience and loquacity. He who retains the high-mindedness and noble aspirations which distinguished his early career may, with the best intentions, be led astray into dangerous courses, and may bring about a collision between different authorities in the state which had long moved harmoniously, by indiscreetly attempting new modes of redressing grievances, and by an uncalled-for display of heroism.

None of these errors could be imputed to Holt. From his start as a magistrate he exceeded the high expectations which had been formed of him, and during the long period of twenty-two years he constantly rose in the admiration and esteem of his countrymen. To unsullied integrity and lofty independence, he added a rare combination of deep professional knowledge with exquisite common-sense. According to a homely but expressive phrase, "there was no rubbish in his mind." Familiar with the practice of the court as any clerk,—acquainted with the rules of special pleading as if he had spent all his days and nights in drawing declarations and demurrers,—versed in the subtleties of the law of real property as if he had confined his attention to conveyancing,—and as a commercial lawyer much in advance of any of his contemporaries,—he ever reasoned logically,—appearing at the same time instinctively acquainted with all the feelings of the human heart, and versed by experience in all the ways of mankind. He may be considered as having a genius for magistracy, as much as our Milton had for poetry, or our Wilkie for painting. Perhaps the excellence which he attained may

Holt's
merits as a
Judge.

CHAP. XXIII. be traced to the passion for justice by which he was constantly actuated. This induced him to sacrifice ease, and amusement, and literary relaxation, and the allurements of party, to submit to tasks the most dull, disagreeable, and revolting, and to devote all his energies to one object,—ever ready to exclaim—

. . . "Welcome business, welcome strife,
Welcome the cares of ermined life ;
The visage wan, the purblind sight,
The toil by day, the lamp by night,
The tedious forms, the solemn prate,
The pert dispute, the dull debate,
The drowsy bench, the babbling hall,—
For thee, fair JUSTICE, welcome all !!!"

Burnet's
praise of
Holt.

He is
praised
by the
TATLER.

Holt derived much advantage in his own time from the contrast between him and the Judges who had recently preceded him. Accordingly, his contemporaries speak of him with enthusiasm. Burnet, after giving an account of the manner in which the Revolution Judges were selected, says, "The first of these was Sir John Holt, made Lord Chief Justice of England, then a young man for so high a post, who maintained it all his time with a great reputation for capacity, integrity, courage, and despatch."¹ Said the TATLER, "He was a man of profound knowledge of the laws of his country, and as just an observer of them in his own person. He considered justice as a cardinal virtue, not as a trade for maintenance. The criminal before him knew that, though his spirit was broken with guilt, and incapable of language to defend itself, his judge would wrest no law to destroy him, nor conceal any that would save him. He never spared vice; at the same time he could see through the hypocrisy and disguise of those who have no pretence to virtue themselves but by their severity to the vicious."²

1. Own Times. iii. 6.

2. Tatler, No. xiv.

The lustre of his fame in later times has been somewhat dimmed by our being accustomed to behold judges little inferior to him; but we ought to remember that it is his light which has given splendor to these luminaries of the law. During a century and a half, this country has been renowned above all others for the pure and enlightened administration of justice; and Holt is the model on which, in England, the judicial character has been formed.

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Holt the
model for
succeeding
judges.

He complained bitterly of his reporters, saying that the *skimble-scamble stuff* which they published would "make posterity think ill of his understanding, and that of his brethren on the bench." He chiefly referred to a collection of Reports called "*MODERN*," embracing nearly the whole of the time when he sat on the bench,—which are composed in a very loose and perfunctory manner. More justice is done to him by Salkeld, Carthew, Levinz, Shower, and Skinner,—but these do little more than state dryly the points which he decided, and we should have been left without any adequate memorial of his judicial powers had it not been for admirable Reports of his decisions published after his death. These, beginning with Easter Term, 6 W. & M., were compiled by Lord Raymond,¹ who was his pupil, and who became his successor. Many of them are distinguished by animation as well as precision, and they form a delightful treat to the happy few who have a genuine taste for juridical science.

A.D. 1689—
1710.
His re-
porters.

In deciding private rights, Chief Justice Holt's great achievement was, that he moulded the old system which he found established to the new wants of an altered state of society. The rules of the common

His great
achievement
in
deciding
private
rights.

1. Robert, Lord Raymond, an English judge, born about 1673, was Chief Justice of the King's Bench in the reign of George I., and a Privy Councillor. His "*Reports*" were published in three volumes. Died in 1733.—*Thomas' Bng. Dict.*

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XXIII.

law had been framed in feudal times, when commerce was nearly unknown and personal property was of little value. Manufactures were now beginning to flourish; there was an increased exchange of commodities with foreign countries; and the English colonies in America were rising into importance. Yet, it having been adjudged in the YEAR-BOOKS that "a chose in action (or debt) cannot be transferred, because livery of seisin cannot be given of it as of land," the negotiability of bills of exchange and of promissory notes (or goldsmiths' notes, as they were called) was in a state of utter confusion, and nobody could tell what were the liabilities or remedies upon them.¹ By a long series of decisions, and by an act of parliament which he suggested, he framed the code by which negotiable securities are regulated nearly as it exists at the present day. He likewise settled several important questions in the law of insurance, although it was reserved for Lord Mansfield to expand and to perfect this important branch of our jurisprudence. From Holt's acquaintance with the writings of the civilians, he most usefully liberalized, defined, and illustrated the general law of contracts in this country.

His celebrated
judgment
in *Coggs v.*
Bernard.

The most celebrated case which he decided in this department was that of *Coggs v. Bernard*, in which the question arose, "whether, if a person promises without reward to take care of goods, he is answerable if they are lost or damaged by his negligence?" In a short compass he expounded with admirable clearness and accuracy the whole law of *bailment*, or the liability of

1. It was then doubted whether any one could draw, accept, or indorse a bill of exchange except a merchant?—whether notice of the dishonor of a bill was necessary to charge the drawer or indorser?—whether an indorser was liable except on default of the drawer?—whether there was any distinction between foreign and inland bills?—whether interest was recoverable on dishonored bills? and whether a promissory note, payable to order, was transferable by indorsement?

the person to whom goods are delivered for different purposes on behalf of the owner; availing himself of his knowledge of the Roman civil law, of which most English lawyers were as ignorant as of the Institutes of Menu.¹ Thus he began:

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"There are six sorts of bailments:—First, a mere delivering goods by one man to keep for the use of the owner; and this I call a *depositum*. The second sort is where goods are lent to a friend gratis to be used by him; and this is called *commodatum*, because the thing is to be restored in specie. The third sort is where goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*; the lender is called *locator*, and the borrower *conductor*. The fourth sort is where goods are delivered to another as a pawn to be a security to him for money borrowed of him by the bailor; and this is called in Latin *zadium*. The fifth sort is where goods are delivered to be carried, or something to be done about them, for a reward to be paid by the person who delivers them to the bailee. The sixth sort is where there is a delivery of goods to somebody who is to carry them or do something about them gratis, without any reward for such his carriage or work; which is the present case."

He explains the law of bailment.

He then elaborately goes over the six sorts of bailment, showing the exact degree of care required on the part of the bailee in each, with the corresponding degree of negligence which will give a right of action to the bailor. In the last he shows that, in consideration of the trust, there is an implied promise to take ordinary care; so that, although there be no reward, for a loss arising from gross negligence the bailee is liable to the bailor for the value of the goods.

Sir William Jones² is contented that his own mas-

1. Menu was the son of Brahma; his Institutes are the great code of Indian civil and religious law.—*Brewer's Dict. of Phrase and Fable*.

2. Sir William Jones (1746–1794), Oriental scholar, was born at Beaufort Buildings, Westminster; losing his father in his infancy, his education devolved upon his mother, a woman of exceptional ability; and his precocious genius was encouraged by his father's scientific friends. He was entered at Harrow School in the Michaelmas Term of 1753, and spent more than ten years there under the masterhips of Dr. Thackeray and

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High opinion of his judgment held by Jones and Story.

He lays down the doctrine that a slave becomes free by breathing the air of England.

terly essay "On the Law of Bailments" shall be considered merely as a commentary upon this judgment; and Professor Story,¹ in his "Commentaries on the Law of Bailments," represents it as "a prodigious effort to arrange the principles by which the subject is regulated in a scientific order."

Holt was the first to lay down the doctrine, which was afterwards fully established in the case of *Somerset the negro*,² that the *status* of slavery cannot exist in England, and that as soon as a slave breathes the air of England he is free. The question originally arose before him in a very technical shape. In point of fact, a slave had been sold in Virginia, where slavery was allowed by law; and, an action being brought in the Court of King's Bench for the price, the declaration stated that "the defendant was indebted to the

Dr. Sumner. He not only became a thorough classical scholar, but learned French and Italian, and the rudiments of Arabic and Hebrew, in his leisure hours. At the age of nineteen he became tutor to Lord Althorp, and during his residence at Wimbledon, in Earl Spencer's family, he greatly enlarged his acquirements in Oriental literature. In 1769 he made a tour in France, and about the same time undertook, at the request of the King of Denmark, to translate the history of Nadir Shah from Persian into French. But Jones soon found that the study of Oriental literature, though it might bring him reputation, did not furnish a means of livelihood. He therefore turned his thoughts to a legal career, and was called to the bar at the Middle Temple in 1774. He became a profound jurist. In 1780 he published "An Inquiry into the Legal Mode of Suppressing Riots," and in 1781 an essay "On the Law of Bailments."—*Stephen's Biog. Dict.*

1. Joseph Story, an eminent American judge and writer upon jurisprudence, who commenced practice in 1801, and soon became one of the most distinguished lawyers of the United States. In 1811 he was nominated Associate Judge of the Supreme Court, and at a subsequent period accepted the Dana professorship of law at Harvard University. His legal works enjoy a European reputation, and are highly esteemed even in England, where the legal literature of other countries is less regarded than elsewhere. His principal works were, "Commentaries on the Conflicts of Laws;" "Commentaries on the Constitution of the United States;" treatises upon Equity Jurisprudence, the Law of Bailments, of Bills of Exchange, of Promissory Notes, and of Partnership. Born at Marblehead, Massachusetts, U. S., 1779; died at Cambridge, near Boston, 1845.—*Beeton's Biog. Dict.*

2. 20 St. Tr. 23.

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plaintiff in the parish of St. Mary-le-Bow, in the ward of Cheap, in the City of London, for a negro slave *there* sold and delivered,"—allegations of time and place in such proceedings being generally immaterial. But on this occasion, after a verdict for the plaintiff, there was a motion in arrest of judgment because the contract in respect of which the supposed debt arose was illegal. *Holt, C. J.*: "As soon as a negro comes into England he is free; one may be a *villein* in England, but not a slave. The action would have been maintainable if the sale had been alleged to be in Virginia, and that, by the law of the country, slaves are salable there." *Judgment arrested.*¹

Subsequently, an action of trover was brought in the Court of Queen's Bench to recover the value of a negro alleged to be the property of the plaintiff, and to have been unlawfully detained by the defendant. The plaintiff's counsel relied upon a decision of the Court of Common Pleas, "that trover will lie for a negro, because negroes are heathens, and therefore a man may have property in them, and, without averment, notice may be taken judicially that negroes are heathens." But *per Holt, C. J.*: "Trover does not lie for a black man more than for a white. By the common law no man could have a property in another man, except in special cases, as in a villein, or a captive taken in war; but in England there is no such thing as a slave, and a human being never was considered a chattel to be sold for a price, and, when wrongfully seized, to have a value put upon him in damages by a jury like an ox or an ass."²

He likewise scouted the doctrine about "forestalling and regrating," by which commerce continued to be cramped down to the end of the reign of George III.; showing that, if acted upon, every man who

He holds
that trover
does not
lie for a
negro.

He scouts
the doc-
trine about
"forestall-
ing and re-
grating."

1. *Smith v. Brown*, Cases temp. Holt, 405.

2. 3 Keble, 685; 1 Lord Raym. 146; 2 Lord Raym. 1275; Salk. 660.

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wished to have a dish of fish must go and buy it at Billingsgate,¹ as it would be unlawful for fishmongers to buy turbot or lobsters there for the purpose of selling them again.²

His construction of the statute requiring persons to attend their parish churches.

He showed considerable boldness in deciding that under the statute of Elizabeth, subjecting to a penalty all who do not frequent their parish church on Sunday, a man is excused who frequents any other church. *Holt, C. J.*: "Parishes were instituted for the ease and benefit of the people, and not of the parson, that they might have a place certain to repair to when they thought convenient, and a parson from whom they had right to receive instructions; and if every parishioner is obliged to go to his parish church, then the gentlemen of Gray's Inn and Lincoln's Inn must no longer repair to their respective chapels, but to their parish churches; otherwise they may be compelled to it by ecclesiastical censures."³

He puts an end to the practice of giving evidence against a prisoner of prior misconduct.

He put an end to the practice which had hitherto prevailed in England, and which still prevails in France, of trying to show the probability of persons having committed the offence for which they are tried by giving evidence of former offences of which they are supposed to have been guilty. Thus, on the trial before him of Harrison, for the murder of Dr. Clench, the counsel for the prosecution calling a witness to prove some felonious design of the prisoner three years before, the Judge indignantly exclaimed, "Hold, hold! what are you doing now? Are you going to

1. Close to the Custom-house is the famous fish-market of *Billingsgate*, rebuilt 1876. Geoffrey of Monmouth says that the name *Billingsgate* was derived from Belin, King of the Britons, A.C. 400, having built a water-gate here, and that when he was dead his ashes were placed in a vessel of brass upon a high pinnacle of stone over the said gate. The place has been a market for fish ever since 1351.—*Hare's Walks in London*.

2. 1 Shower, 292.

3. *Britton v. Standish*, Cases temp. Holt, 141.

arraign his whole life? How can he defend himself from charges of which he has no notice? and how many issues are to be raised to perplex me and the jury? Away, away! that ought not to be; that is nothing to this matter."¹

He likewise put an end to the revolting practice of trying prisoners in fetters. Hearing a clanking when Cranborne, charged with being implicated in the "Assassination Plot,"² was brought to the bar to be arraigned, he said, without any complaint having been made to him, "I should like to know why the prisoner is brought in ironed. If fetters were necessary for his safe custody before, there is no danger of escape or rescue here. Let them be instantly knocked off. When prisoners are tried, they should stand at their ease."³

A still more important improvement in criminal trials, on his suggestion, was introduced by Parliament passing an act which, for the first time, allowed witnesses called for the prisoner to be examined upon oath.⁴

Holt's associates in the King's Bench were very respectable men, who had either been removed from their independence by James II., or were selected from the bar for knowledge and good character. They occasionally differed from him, but never factiously combined against him. We have, on the contrary, some remarkable instances of their candor. Thus, in *Regina v. Tutchin*, Powys and Gould having delivered opinions one way, and Powell and Holt the other, the report concludes with this "*Memorandum*: Powys,

1. 12 St. Tr. 833-874.

2. The Assassination Plot was an attempt on the life of William III., first designed in 1695, but postponed by William's departure for Flanders. — *Low and Pulling's Dict. of Eng. Hist.*

3. 13 St. Tr. 221.

4. 1 Ann. st. 2, c. 9.

CHAP. Justice, recanted *instantly*, and Gould, Justice, *hesita-*
XXIII. *bat*." ¹ At times he was too subtle and profound for
them. Of this Lord Raymond gives an instance in
language which shows that he had no great veneration
for the *Puisnès*. After mentioning a decisive objec-
tion to an action started by the Chief Justice, he says,
"The three Judges seemed to be in a surprise, and not,
in truth, to comprehend this objection; and, therefore,
they persisted in their former opinion, talking of
'agreements,' 'intent of the party,' 'binding of the land,'
and I know not what; and so they gave judgment
for the plaintiff, against the opinion of Holt, Chief
Justice."²

Weight of
his opin-
ion with
the public.

We have a remarkable proof of the overwhelming
weight which his opinion carried, even when he was
wrong. An action being brought against the Post-
master General for the loss of Exchequer bills occa-
sioned by the negligence of an inferior agent in the
employment of the Post-office, Holt, by a false analogy
between this and actions against the sheriff and other
officers who are supposed to do in person the duty
the breach of which is complained of, maintained that
the Postmaster General was liable. Powys, Gould,
and Turton, taking a juster view of the subject, said
that, although an action lies against a public officer at
the suit of those who suffer a private damage from his
default, it must be brought against the person who
has violated the law; and that to apply the maxim
respondet superior to the head of a great department
of the state would be injurious to the individual, and
detrimental to the public. So judgment was given for
the defendant. But, the plaintiff having declared that
he would bring a writ of error in the Exchequer
Chamber, and, if necessary, to the House of Lords, the

1. 6 Mod. 287.

2. *Brewster v. Kitchen*, 1 Lord Raym. 322.

Postmaster General was so frightened, and considered it so certain that Holt would be declared to be in the right, that, rather than continue the litigation, he paid the whole of the demand.¹

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XXIII.

One of the most whimsical questions which arose before him he thus settled: "If a man be hung in chains on my land, after the body is consumed, I shall have the gibbet and chain as affixed to the freehold."²

But, as a mere Judge settling civil rights, great as were his merits, he probably would soon have been known only to dull lawyers who search for precedents. It was by his conduct in presiding on the trial of state prosecutions, and in determining questions of constitutional law in which the two Houses of Parliament were parties, that he acquired an immortal reputation.

His conduct in presiding at the trial of state prosecutions.

During the two last preceding Stuart reigns, the administration of criminal justice in cases in which the Crown was concerned had been becoming worse and worse, till at last it reached the utmost verge of infamy. The most powerful justification of the Revolution will be found in the volumes of the State Trials: and I have heard the late Lord Tenterden,³ a very zealous though

The most powerful justification of the Revolution in the State Trials.

1. *Low v. Sir Robert Cotton*, 1 Lord Raym. 646. This strange opinion of Holt was solemnly overruled by the Court of King's Bench in Lord Mansfield's time; the law ever since being considered quite settled in favor of the Postmaster General. *Whitfield v. Lord Le Despencer*, Cowp. 754.

2. 1 Lord Raym. 738. But the French courts lately decided that a stone falling from the heavens belongs to the finder, and not to the owner of the field on which it falls.

3. Charles Abbott, Lord Tenterden, was born on October 7, 1762, in the precincts of Canterbury Cathedral, where his father, John Abbott, carried on a respectable business as a wig-maker and hair-dresser. His mother was Alice, daughter of Daniel Bunce of the same city. Having entered the grammar-school there, called, from its foundation by Henry VIII., the King's School, by his industry and cleverness he gave such satisfaction to his master, Dr. Osmond Beauvoir, and to the reverend trustees of the cathedral, that he received one of the school exhibitions

CHAP. enlightened defender of indefeasible hereditary right,
XXIII. declare that "they almost persuaded him to become a Whig." Chief Justices, worse than any before known, were turned out to make place for successors who were still more atrocious. From the proceedings on the trials of Alderman Cornish and of Mrs. Gaunt we may see that, from a course of unblushing violation of the rules framed for the protection of innocence, the judges had lost all sense of decency, and were in the habit of browbeating witnesses, insulting juries, and

on his admission into Corpus Christi College, Oxford, in March, 1781, where he immediately obtained a scholarship. At Oxford he distinguished himself by gaining the only two honors which the University then bestowed, the Chancellor's medals for Latin and English compositions. He entered himself at the Middle Temple on November 16, 1787; but in May, 1793, he removed to the Inner Temple, by which he was ultimately called to the bar. In the mean time, for the purpose of acquiring a practical knowledge of the working of the law, he attended for some months the office of Messrs. Sandys & Co., attorneys in considerable business, and then placed himself under Mr. (afterwards Baron) Wood, the leading pleader of that day. Such was his reputation as a special pleader, that no sooner did he assume the barrister's gown than he was employed as junior counsel for the Crown in all the numerous state prosecutions for the next ten years, under the Attorney-generalships of Lord Eldon, Lord Redesdale, Lord Ellenborough, and the Hon. Spencer Perceval. In 1801 he was elected Recorder of Oxford; and in 1802 he published a work on "The Law relating to Merchant Ships and Seamen," a treatise which was praised by all jurists, and at once became the standard book and practical guide on the subject. It raised Mr. Abbott's reputation so high, and consequently brought him such an accession of employment in commercial and maritime cases, that when an income-tax was imposed in 1807 he returned his professional receipts during the previous year at £,026*l.* 5*s.* On the death of Mr. Justice Heath, Mr. Abbott was raised to the vacant seat in the Common Pleas on Jan. 24, 1816, receiving the customary honor of knighthood. He remained in that court little more than three months, removing on May 3, very unwillingly, but at the urgent solicitation of Lord Ellenborough, to the Court of King's Bench as the successor of Sir Simon Le Blanc. His excellence in a judicial character was so prominent that, when Lord Ellenborough resigned two years and a half after, he was elevated to the Chief Justiceship on Nov. 4, 1818. After having continued in the office for nine years, and established his fame by the exemplary manner in which he fulfilled its duties, the royal wish was intimated to him that he should be created a peer; and he was accordingly ennobled, by the title of Baron Tenterden, of Hendon in Middlesex, on April 30, 1827.—*Foss's Lives of the Judges.*



SIR WILLIAM JONES.



seeking to crush the accused, without any consciousness of impropriety.

CHAP.
XXIII.

Holt had been Chief Justice little more than a year, when, as a Criminal Judge between the Crown and the subject, his qualities were put to a severe test. Lord Preston, a Scottish nobleman, had engaged in a very formidable conspiracy to dethrone King William and to restore King James. Had he succeeded, he would have been celebrated in history for his loyalty; and the first consequence would have been, that the ministers and judges now acting under royal authority would have been tried as traitors. According to recent examples, the prisoner, if not attainted by act of parliament without the form of trial, ought, after reading some depositions against him taken in his absence, and the examination of a pretended accomplice, to have been stopped as often as he attempted to speak in his defence; and, upon a verdict of guilty by a packed jury, to have been led off to execution. But this was a new era in our juridical annals. Lord Preston had quite as patient and as fair a trial as any prisoner would have before Lord Denman in the reign of Queen Victoria. He first resolutely insisted that he was not liable to be tried in this fashion, because he was a peer of Scotland. When his plea was properly overruled, he expressed some apprehension that he might have given offence by his pertinacity; but the Chief Justice mildly observed, "My Lord, nobody blames you, though your Lordship do urge matters that cannot be supported; and we shall take care that they do not tend to your Lordship's prejudice. We consider the condition you are in; you stand at the bar for your life: you shall have all the fair and just dealings that can be; and the Court, as in duty bound, will see that you have no wrong done you." Although a clear case for the Crown was made out by witnesses

Trial of
Lord Pres-
ton for
high
treason.
A.D. 1690.

CHAP.
XXIII.
Lord Preston's trial,
continued,

of undoubted credit, and the Chief Justice summed up the evidence with perfect accuracy and fairness, the prisoner repeatedly interrupted him. *Holt, C.J.*: "Interrupt me as much as you please, if you think I do not observe right; I assure you I will do you no wrong willingly." *Lord Preston*: "No, my Lord, I see it well enough that your Lordship would not." When the jury were about to retire to consider of their verdict, Lord Preston requested to speak again, although he had been before fully heard. *Holt, C.J.*: "It is contrary to the course of all proceedings to have any thing said to the jury after the Court has summed up the evidence; but we will dispense with it: what further have you to say?" *Lord Preston*: "I humbly thank your Lordship; I am not acquainted with such proceedings, but, whatsoever my fate may be, I cannot but own that I have had a fair trial for my life." He was then patiently heard, and he chiefly complained of some harsh treatment he had experienced from the new Government when he wished, as he alleged, to live quietly in the country. *Holt, C.J.*: "Suppose your Lordship did think yourself hardly used, yet your Lordship must remember it was in a time of danger your Lordship was taken up, and you had showed your dissatisfaction with the present Government; and, therefore, they were not to be blamed if they secured themselves against you." The jury, without hesitation, found a verdict of GUILTY; but, with the entire concurrence of the Chief Justice, the prisoner afterwards received a free pardon.¹

When Charnock,² and the other conspirators en-

1. 12 St. Tr. 646-822; Lives of the Chancellors, iv. 103.

2. Robert Charnock, or Chernock (1663?-1696), Vice-president of Magdalen College, Oxford, and Jacobite conspirator, was the son of Robert Charnock of the county of Warwick, and matriculated at Magdalen College, Oxford, May 27, 1680. In 1686 he was elected Fellow of his college by royal mandate, and soon after declared himself a

gaged in the attempt upon the life of King William, CHAP. XXIII.
A.D. 1696.
Rex v.
Charnock. came to be tried before him, although he was obliged to refuse them a copy of the indictment and the assistance of counsel because the statute to regulate trials for high treason had not come into operation, he conducted the trial with the utmost impartiality and moderation, and in strict conformity to the rules of evidence as we now understand them. At the same time, he answered with firmness the objection that "words cannot amount to treason," marking the distinction whether the *words* have reference to an *act*. *Holt, C. J.*: "Now I must tell you, gentlemen, it is true in some cases that words, however seditious, are not treason; for such words loosely spoken, without relation to any act or design, are only a misdemeanor. But arguments, and words of persuasion, to engage in a design on the King's life, and directing or proposing the best way for effecting it, are overt acts of high treason. If two agree together to kill the King, though the agreement be verbal only, they are guilty of this offence; consulting together for such a purpose, though there is nothing reduced to writing, and nothing done upon it, is an overt act of high treason."¹

Roman Catholic. He became a priest about the same time. On the death of the President of Magdalen, Dr. Henry Clarke, Charnock vigorously aided James II. in his attempt to force on the college a president of his own choosing. Later, a royal mandate constituted him Vice-president of Magdalen, but on Oct. 25, 1688, he was expelled. In 1692 his enthusiasm for the Jacobite cause led him to adopt the desperate device of attempting the assassination of William III. The plot being discovered, capital sentence was passed, and he was drawn, hanged, and quartered at Tyburn. On the scaffold he handed a paper to the sheriff in which he acknowledged his guilt, but exculpated James II. and the English Roman Catholics from any share in the conspiracy.—*Stephen's Nat. Biog.*

1. 12 St. Tr. 1451. Afterwards, on the trial of Sir William Parkyns, concerned in the same plot, Holt, in commenting on the treasonable consult, observed,—“But, says Sir William Parkyns, ‘this is only words, and words are not treason;’ they are words that relate to acts, and, if you believe that they were spoken, they amount to treason.”—13 St. Tr. 132. These passages, if cited, might have considerably shortened cer-

CHAP.
XXIII. The prisoners were very justly found guilty, and executed.

*Rex v.
Rookwood.*

Before Ambrose Rookwood, implicated in the same conspiracy, could be brought to trial, the statute for regulating trials for high treason had come into operation; and Sir Bartholomew Shower, being assigned as counsel for him, was making some apologies for the boldness of the line of defence adopted. *Holt, C. J.*: "Never make apologies, Sir Bartholomew, for it is as lawful for you to be of counsel in this case as it is in any other case in which the law allows counsel. It is expected you should do your best for those you are assigned to defend against the charge of high treason (though for attempting the King's life), as it is expected in any other case that you do your duty to your client."¹ He summed up, however, with energy, taking care, as he always properly did, to assist the jury in coming to a right conclusion. Thus he began: "The prisoner is indicted for high treason in designing and compassing the death of the King, which was to be effected by an assassination in the most barbarous and wicked manner, being to surprise the King and murder him in his coach. The question, gentlemen, is, whether this prisoner be guilty of the crime, or no?"²

Holt's conduct, in presiding at these trials, was applauded even by the Tories. But a charge was brought against him, by Ralph, of straining the law of high treason to please the Government in the case of Sir John Freind.³ The bigoted historian, having

tain debates in the House of Commons in the session of 1848, on the "Bill for the Protection of the Crown and Government."

1. 13 St. Tr. 154.

2. 13 St. Tr. 263.

3. 13 St. Tr. 1. Sir John Freind (*d.* 1696), conspirator, was the eldest son of John Freind, a brewer, who resided in the precinct of St. Catharine's, near the Tower of London. He followed his father's business, and amassed considerable wealth. Though avowedly a Protestant, he re-

bitterly censured the conviction, says, with affected candor, "The Lord Chief Justice Holt, who presided on this occasion, has in general the character of an upright judge; but almost all lawyers have narrow minds, and, by the whole drift of their studies, find themselves biassed to adhere to the King again st the prisoners." The direction given to the jury on this occasion, when examined, will be found quite unexceptionable. The prisoner was indicted for compassing the King's death, and was clearly proved to have had the design of dethroning him. An overt act relied upon was, despatching a deputy to France to invite the French King to send over an army to assist those confederated against the Government. Having summed up the evidence, the Chief Justice said :

"Now, Sir John Freind insists, as a matter of law, that as the statute of Edward III. makes two treasons, one compassing the death of the King, and another the levying of war; and as war was not actually levied in this case, a bare conspiracy or design to levy war does not come within this law against treason. For that I must tell you, gentlemen, that if there be only a conspiracy to levy war, it is not treason; but if the design be either to kill the King, or to depose him, or imprison him, or put any force or restraint upon him, and the way or method of effecting the object is by levying war, then the conspiracy to levy war for that purpose is high treason, though no war be levied; for such conspiracy is an overt act, proving the compassing the death of the King. If a man designs the death, deposition, or destruction of the King, and, to effect the design, agrees and consults to levy war,—that this should not be high treason, no war being actually levied, is a very strange doctrine, and the contrary has

mained a faithful adherent of James II., by whom he was knighted Aug. 3, 1685. He refused to take any share in the infamous plot against the life of William III., although he kept the secret. On the discovery of the conspiracy, he was arraigned for high treason at the Old Bailey, March 23, 1696, and was denied the assistance of counsel by Chief Justice Holt. The act which allowed counsel in cases of treason came into operation two days later (March 25). Freind was convicted and sentenced to death. His life might yet have been spared had he not manfully refused to betray his confederates to a committee of the House of Commons.—*Stephen's Nat. Biog.*

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Vindica-
tion of
Holt for
the law
hard down
by him in
Sir John
Freind's
Case.

His dis-
tinction
between
the levying
of war and
a bare
design to
do so.

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always been held to be law. There may be war levied without any design upon the King's person or endangering of it, which, if actually levied, is high treason ; but a bare design to levy war, without more, does not amount to that offence."

The preceding passage cited with applause by Erskine.

This distinction is fully justified by prior authorities, and has ever since been adhered to. Erskine, in his celebrated defence of Hardy,¹ actually cites this very passage with applause,—saying, "If I had any thing at stake short of the life of the prisoner, I might sit down as soon as I have read it ; for if one did not know it to be an extract from an ancient trial, one would say it was admirably and accurately written for the present purpose."²

1. Thomas Hardy (1752-1832), Radical politician, was born in the parish of Larbert, Stirlingshire. He learned the shoemaker's trade, and in 1791 he set up a bootmaker's shop at No. 9 Piccadilly. Soon afterwards he began to take an active interest in politics. In January, 1792, Hardy with a few friends founded "The London Corresponding Society," with the object of promoting parliamentary reform. The first address of the society, signed by Hardy as secretary, and dated April 2, 1792, was distributed throughout the country in the form of handbills. On Sept. 27 a congratulatory address to the National Convention of France was agreed to by the society, and before the end of the year it was in correspondence with "every Society in Great Britain which had been instituted for the purpose of obtaining by legal and constitutional means a Reform in the Commons' House of Parliament" (Hardy, *Memoir*, p. 24). In December, 1793, the Edinburgh convention was dispersed, and Margaret and Gerrald, the delegates from the London Corresponding Society, were arrested. It was accordingly settled that another convention should be held in England, to which the Scottish societies should send delegates. This the Government determined to prevent, and on May 12, 1794, Hardy was arrested on a charge of high treason, and his papers seized. On Oct. 28 his trial began, and lasted eight days, when he was acquitted.—*Stephen's Nat. Biog.*

2. 13 St. Tr. 1-64. The late statute, 11 Vict. c. 12, will probably for ever put an end to such questions, as we shall henceforth have no trials for high treason unless where there has been an actual design against the person of the sovereign, or an actual levying of war, or an actual adhering to the King's enemies. Conspiracies to bring about a revolution in the government, or to levy war, will henceforth be prosecuted as felonies. This appears to me to be a great improvement in our criminal code. The construction put upon the statute of Edward III., that a conspiracy to levy war was an overt act, to prove a compassing of the King's death, was very strained and far-fetched. Different offences against the state are now properly discriminated, and between treason and misdemeanor an intermediate class is established, with easy means of prosecu-

Without meaning any reflection upon Holt, who always maintained his character as a good Whig, I must mention his doctrine respecting the liberty of the press, which shows that, in the second reign after the Revolution, the legal right of political discussion had not yet been acquired. If this doctrine were now acted upon, the "Government Journal," which supports, through thick and thin, all the measures of the administration for the time being, would have a monopoly, and there is hardly a newspaper published in the United Kingdom which might not be prosecuted as libellous. On the trial of the printer of the OBSERVER for an article abusing Queen Anne's ministers pretty freely, but in language which we should consider very innocent, the defendant's counsel having attempted to justify it, Holt, C. J., observed: "I am surprised to be told that a writing is not a libel which reflects upon the government, and endeavors to possess the people with the notion that the government is administered by corrupt persons. If writers should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. You are to consider whether the words which I have read to you do not tend to beget an ill opinion of the administration of the government. Their purport is, that 'those who are employed know nothing of the matter, and those who do know are not employed; that men are not adapted to offices, but offices to men, out of a particular regard to their interest and not to their fitness.'" The defendant was accordingly found guilty.¹

tion and an appropriate punishment. The conviction of *Mitchell* upon this statute has proved its efficacy. (May 29, 1845.)

1. 14 St. Tr. 1128. But, although such was considered the letter of the law, the periodical press was much less decorous than at the present day, and the private life of public men was then mercilessly exposed and traduced. Any one now writing of political opponents as Swift did of Somers and Cowper, with whom he had been on terms of intimate friendship, would be expelled from society.

CHAP.
XXIII
Liberty of
the press in
the reign
of Queen
Anne.

A.D. 1704.

Holt's
doctrine.

CHAPTER XXIV.

CONTINUATION OF THE LIFE OF LORD CHIEF JUSTICE
HOLT TILL THE TERMINATION OF HIS CONTESTS
WITH THE TWO HOUSES OF PARLIAMENT.

CHAP. XXIV.
Holt's contest with the House of Lords in *Rex v. Knowllys*.
I NOW come to Holt's contests with the two Houses of Parliament, from which his popularity has principally arisen. The first was with the House of Lords, and throughout the whole of it he conducted himself most laudably—strictly confining himself within the jurisdiction of his court, and, while he nobly vindicated his own independence, never seeking an opportunity for display or wantonly hazarding a collision between rival authorities.

A.D. 1694.
An indictment for murder having been found against Charles Knowllys, Esq., and removed by *certiorari* into the Court of King's Bench, he pleaded in abatement "that he was a peer of the realm, and ought to be tried by his peers, being, as of right, Earl of Banbury, and lineally descended from William Knowllys, created Earl of Banbury by King Charles II." The replication stated, "that the prisoner had presented a petition to the Lords spiritual and temporal, praying that he might be tried by them on this charge, and that parliament had thereupon, *secundum legem et consuetudinem*, resolved that he had no right to the Earldom of Banbury." There was a demurrer to the replication, and the Lords very absurdly were much offended that the Court of King's Bench did not instantly, in conformity to this resolution, overrule the plea. But, after solemn argument, Holt gave judgment that the plea was good, and the replication bad

—mainly upon the ground that this could not be considered *res judicata*—as the Lords had no authority to decide a question of peerage except on a reference from the Crown, and, therefore, that their resolution respecting the Earldom of Banbury was a proceeding *coram non judice*,¹ and a nullity. Having clearly shown that the Lords had no original jurisdiction on the subject, and that the question of the prisoner's right to be tried as a peer had never been judicially brought before them, he observed,—

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Rex v.
Knowllys,
continued.

"I admit that the House of Peers has jurisdiction over its own members, and is a supreme court; but it is the law which has vested them with such ample authority, and therefore it is no diminution to their power to say that they ought to observe the limits prescribed for them by this law, which, in other respects, hath made them so great. As to the averment in the replication that the judgment was '*secundum legem et consuetudinem parliamenti*,' I know no reason for its introduction by the King's counsel unless they thought to frighten the Judges: but I regard it not; for though I have great respect and deference for the Houses of Parliament, yet I sit here to administer justice according to the law of the land, and the oath I have sworn. Inheritances are to be determined not by the custom of parliament, but by the common law of England, which is the birth-right of every Englishman. Custom ought to consist in usage, and I desire to see the precedent of such judgments. No precedent hath been alleged to warrant the determining inheritances originally *per legem parliamenti*. If inheritances were determinable by the Lords without their having jurisdiction, they would have uncontrollable power, and '*res est misera, ubi jus est vagum*.'"²

So judgment was given in favor of the plea in abatement, and the prisoner was discharged without being tried.

It is quite clear that Holt had not in the slightest degree encroached on the privileges of the House of

1. "Before one who is not a judge"—before an improper tribunal.

2. "It is an unfortunate state of affairs when justice is unsettled."

CHAP. XXIV. Lords. His court had jurisdiction of the murder only upon the supposition that the party accused was a commoner, and, unless a sufficient answer was given to the plea that he was a peer, its jurisdiction was gone. The resolution of the Lords on his petition, being a proceeding *coram non judice*, was no answer at all, and the trial before the King's Bench therefore could not possibly go on.

Holt is summoned before a Committee of Privileges. Feb. 5, 1697-98.

Knowllys, when set at liberty, still assumed the title of Earl of Banbury, and, two or three years afterwards, he petitioned the Crown for a writ of summons that he might take his seat as a peer. This was regularly referred to the House of Lords, who found themselves in a great puzzle; for, although they now clearly had jurisdiction to examine and decide upon the claim, they were unwilling to confess that their former determination was invalid. They very foolishly resolved to wreak their vengeance upon Lord Chief Justice Holt, and they made an order that he should attend the Committee of Privileges appointed to consider the claim. He attended accordingly, when the Chairman of the Committee thus addressed him:

"My Lord Chief Justice Holt: Their Lordships have perused the record of the Court of King's Bench relating to the trial of the person who calls himself Earl of Banbury for murder, from which it appears that the Court of King's Bench thought fit to quash the indictment against the said person there called Charles Knowllys, Esq., although the House of Lords had determined that he had no right to the title of Earl of Banbury. You are now desired to give their Lordships an account why that Court whereof you are Chief Justice hath so done." *Holt, C. J.*: "I acknowledge the thing. I gave the judgment, and I gave it according to my conscience. We are trusted with the law; we are to be protected and not arraigned; we are not to give the reasons for our judgment in this fashion, and therefore I desire to be excused giving any."

He was directed to withdraw, and, after some de-



PHILIP EARLE HARDYNG



liberation among the members of the Committee, he was called in again, and asked with much solemnity "if he persisted in the answer he had given?"

Holt, C. J.: "The record shows the judgment I gave. I would be submitting to an arraignment for having given judgment according to law, if I should give any reasons here. I gave my reasons in another place at large. If your Lordships report this my refusal to the House, I should be glad to know when you do so, that I may then desire to be heard in point of law. The judgment is questionable in a proper method by writ of error; but I am not to be thus questioned. I am not any way to be arraigned for what I do judicially. The judgment may be arraigned in a proper manner, and then, being asked, I will state to your Lordships the reasons on which it rests. I might answer if I would, but I think it safest to keep myself under the protection the law has given me. I look upon this as an arraignment; I insist upon it, if I am arraigned, I ought not to answer."

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Account of
Holt's ar-
raignment
before a
Committee
of Privi-
leges, con-
tinued.

The Committee having reported these proceedings to the House, a resolution was passed "to hear the Lord Chief Justice as to this point, whether he did right in refusing to give account to the Committee of his reasons for his judgment in the King's Bench, in relation to quashing the indictment for murder against a person who claimed to be Earl of Banbury." Lord Chief Justice Holt attending, and being called on, the Lord Keeper said to him,—

"You are required to give an account why you refused to answer the questions put to you by a committee of this House. You expressed a wish to be heard when the report was made, and their Lordships have now sent for you to know the reasons why you did not think fit to communicate to the committee the reasons for your judgment." *Holt, C. J.:* "My Lords, I have only respectfully to adhere to what I addressed to the committee, which has been truly reported to your Lordships' House. Your Lordships constitute the highest court known in this kingdom before which all judgments may be brought; and your Lordships may affirm or reverse them as seems you good. I and my brother judges, according to immemorial usage, have a

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Account of
Holt's ar-
raignment
before a
Committee
of Privi-
leges, con-
tinued.

summons to attend in this House *ad consulendum*.¹ Your Lordships have an undoubted right to ask our opinion, with our reasons, on any question of law which comes judicially before you. If a writ of error should be brought before your Lordships in *Rex v. Knowllys*, and your Lordships ask my opinion upon it, I will most willingly render the reasons which induced me, according to my conscience, to give judgment for the prisoner. But I never heard of any such thing demanded of any judge as that, where there is no writ of error depending, he should be required to give reasons for his judgment. I did think myself not bound by law to answer the questions put to me. What a judge does honestly in open court, he is not to be arraigned for."

A debate ensued, and directions were given to the Lord Keeper to inform him "that the questions asked him by the Committee were not intended to accuse."

In truth, this was abandoning the only ground that could be taken for urging the questions. If there had been any suspicion of corruption, the House, in the exercise of its inquisitorial powers, might have taken cognizance of the matter, and, perhaps, examined a party accused; but, in the absence of all notion of improper motive, it was quite plain that a judge could not be interrogated respecting the reasons for a judgment not appealed from. Under such circumstances, the answers could only be to gratify impertinent curiosity. Holt must have been aware of the advantage he had, but he contented himself with saying, "Besides the danger of accusing myself, I have other good and sufficient reasons for declining to answer the questions propounded to me."

The hour of dinner had arrived, which has always been enough to stop important proceedings in their Lordships' house. The debate was therefore adjourned till the following Monday, at which time the Chief Justice was again ordered to attend. In the

1. "For deliberation."

meanwhile their Lordships came to their senses, and found that they had got into a very foolish scrape. The only step they could now take to assert their authority was, to commit the Chief Justice to prison; and, although I do not exactly know what legal remedy in that case he would have had, the probability is that, practically, he would have been released by a general rising of the population of London,—the struggle not adding much to the credit or authority of their Lordships. The House, therefore, by an adjournment, prudently avoided meeting on the day appointed, whereby the order dropped, and it never was renewed. The public had strongly taken the side of the Chief Justice, and his health was given with enthusiasm at all public meetings throughout the kingdom.¹

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His popularity from his triumph over the House of Lords.

He most cautiously abstained from mixing in party politics. Not even in private conversation would he offer an opinion on the question of the Spanish Succession, and he was entirely ignorant of the negotiation of the Partition Treaties.² He remained always on courteous terms with Lord Somers, but there never was much familiarity between them. In the famous "Bankers' Case," which was factiously agitated by many, he, from a sense of duty, gave a judgment which was highly agreeable to the Tories.—Charles II., having made grants by way of annuity out of the hereditary revenues of the Crown, as a compensation to those who had been defrauded by the shutting up of the Exchequer during the CABAL administration, the question was whether these grants were binding on King William III.? In the Exchequer Chamber, Holt supported the claim, on principles which we are rather

The Bankers' Case.
A.D. 1697—1700.

1. 12 St. Tr. 1167-1207; 1 Lord Raym. 10; Carth. 297; Salk. 509; Lord Campbell's Speeches, 326.

2. The Partition Treaties were an attempt to settle from outside the complex question of the Spanish Succession on the death of the King, Charles II.—*Ranke, Hist. of Eng.*

CHAP. surprised to find propounded by a Whig since the
XXIV. Revolution :

Principles
on which
Holt sup-
ported the
Bankers'
claim.

“ It is objected,” said he, “ that this power in the King, of alienating his revenue, may be a prejudice to his people, to whom he must recur continually for supplies. I answer that the law has not such dishonorable thoughts of the King as to imagine he will do anything amiss to his people in those things in which he hath power so to do. But that which I insist on is, that it is absurd in its nature to restrain the King from a power of alienating his revenues, of which he is seised in fee. It is against the nature of the being of a king that he should have less power than his people. Suppose that before his accession the King was seised of lands, the crown descending upon him, he would be seised *jure coronæ* ;—and shall he then have less power over those very lands than he had when a private person ? Shall he now be disabled to alien by being a king ? This would be against a well-known maxim, that the descent of the crown takes away all disability. Then it is repugnant to the constitution of the government. Suppose the King should be under a sudden danger of being invaded : if he could not raise money by alienating his revenue, the nation might perish ; for he could not otherwise raise money than by an act of parliament, for which there might not be time. And there ought to be a power in all governments to reward persons that deserve well, for rewards and punishments are the supporters of all governments ; and it has been the constant usage of the kings of England to reward persons deserving of the Government out of the crown revenues by pensions, and giving estates to support the titles of Earl and other dignities. Some may say they do not deny the King may alienate his own demesnes or any lands that come to him by descent or purchase, but this revenue was settled by act of parliament on the Crown, and therefore it cannot be alienated. I do not find any such distinction in our law-books, nor any authority in the common or statute law that restrains the kings of England from alienating any sort of their revenues. What reason can be given why some estates should be alienable and others not ? If an estate be settled on a subject by act of parliament, he may unquestionably alienate it ; and why shall not the King have the same privilege ? He has always done it. All the abbey lands were given to the King by act of parliament in general terms as here, and he has alienated the whole of them.

So the Customs have been always granted away and charged by the King, although they were given to him by act of parliament. Here there was a consideration for the grant in the debt due from the Crown to the grantees." CHAP. XXIV.

He was likewise of opinion that the Bankers had a remedy against the King by petition, or *monstrans de droit*.¹ This opinion was then overruled,—Lord Somers, who held the Great Seal, taking the opposite side;—but a writ of error was brought in the House of Lords, and there a Tory majority reversed the judgment of the Exchequer Chamber. Jan. 23, 1700.

A motion was soon after made in the House of Commons for the removal of Lord Somers, and, although this was negatived, the King found that he could no longer go on with a Whig administration, and he took the Great Seal from Lord Somers, who had refused voluntarily to resign it. April 10.

King William considered that Holt was by far the fittest man to succeed to it; and, suspecting that his opinion in the Bankers' Case had been influenced by a wish for still higher elevation, sent for him to Hampton Court, and, showing him the "bauble," offered immediately to deliver it into his hand, with the title of Lord Chancellor, a peerage being to follow. What must have been the royal astonishment when Holt pronounced these memorable words,—"I feel highly honored by your Majesty's gracious offer: but all the time I was at the bar I never had more than one cause in Chancery, and *that* I lost, so that I cannot think myself qualified for so great a trust."² The King in vain attempted to shake his resolution, which was perhaps strengthened by the reflection that the tenure of On the removal of Lord Somers, Holt refuses to be Lord Chancellor.

1. 14 St. Tr. 30. So the law then stood. The wonder is to find it so defended. In the succeeding reign the power of alienation was put an end to by the legislature.

2. Granger, l. 164; Cole's Memoirs, p. 123.

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the office he already held was far more secure, as there seemed little probability of any administration being formed which could last many weeks. All that Holt could be induced to promise at this interview was, that if there should be a necessity for putting the Great Seal into commission for a short time, he would act as one of the Lords Commissioners. Trevor,¹ the

1. John Trevor may claim a descent from an elder branch of an old Welsh family, his ancestor being seated at Brynkynalt in Denbighshire at his death in 1494. He was second but eldest surviving son of John Trevor of that place, by Mary, daughter of John Jeffreys, of Helon in the same county, the aunt of the Judge Jeffreys of infamous memory. At the time of his admission to the Inner Temple, in November, 1654, his father is described of Ross-Trevor in Ireland, whither he had probably retired in reduced circumstances, if Roger North's statement (213) be true, that the son "was bred a sort of clerk in the chambers of old Arthur Trevor, an eminent and worthy professor of the law in the Inner Temple." "A gentleman," he adds, "that observed a strange-looking boy in his clerk's seat (for no person ever had a worse sort of squint than he had), asked who that gentleman was: 'A kinsman of mine,' said Arthur Trevor, 'that I have allowed to sit here to learn the knavish part of the law.'" That he was bettered by the instruction may be doubted; but that he became an able proficient there is evidence in the reputation he gained of being the best judge, in all gambling transactions, of the tricks and intricacies of which he had personal experience. He was called to the bar in May, 1661, became Treasurer of his Inn in 1674, and Reader in 1675. He was knighted in 1671, and there is no doubt that he was indebted to his cousin, George Jeffreys, for some of his future preferments. Trevor having obtained a seat in James II.'s only Parliament for the town of Denbigh, Jeffreys, in opposition to Lord Keeper North, succeeded in recommending him to be the Speaker. So inefficient was he in the requirements of the office that he was even obliged to read from a paper the few formal words in which he announced to the House the King's approbation, and was guilty of some other irregularities that were inexcusable in one who had had so long a senatorial experience. He showed more boldness and self-possession on the occasion of presenting the revenue bill on May 30, when he assured the King that the Commons entirely relied on his Majesty's sacred word to support and defend the religion of the Church of England. Of this reminder of the royal promise the King took not the slightest notice, nor apparently any offence, as on the 20th of the following October he promoted Sir John to the office of Master of the Rolls, then vacant. At the Revolution he, with all the other judges, lost his place. Being "a bold and dexterous man," Trevor soon after had a renewal of his legal honors. On January 13, 1690, he was replaced in his old position as Master of the Rolls; and on May 14 he was made one of the Lords Commissioners of the Great Seal, an office which he enjoyed for nearly three years, till the nomina-

Attorney General, and others on whom it was pressed, having likewise refused it, a commission became necessary, and it was delivered to the joint keeping of Lord Chief Justice Holt, Lord Chief Justice Treby, and Lord Chief Baron Ward.¹

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April 27.
He is a
Lord Com-
missioner
of the
Great Seal.

These Lords Commissioners held it nearly a month:

tion of Somers as Lord Keeper on March 23, 1693. Not satisfied with all these honors and the emoluments that flowed from them, Trevor with unblushing rapacity participated largely in the corruption that then too universally prevailed. In the investigation instituted by the Parliament it was found that he had, among other bribes suspected but not proved, received a present from the City of London for getting the Orphans' Bill passed, which had several times before been brought into the House without success. He was condemned to sit for six hours hearing himself abused, and at last was obliged to put the question and to declare himself guilty of "a high crime and misdemeanor." A new Speaker was immediately appointed, and he was expelled the House on March 16, 1695, having only a fortnight before attended in all state the Queen's funeral in Westminster Abbey. No further punishment being awarded, the wits remarked "that justice was blind, but bribery only squinted." He never afterwards offered himself as a member; but so little was he abashed by his expulsion that soon after, on meeting Archbishop Tillotson, he muttered loud enough to be heard, "I hate a fanatic in lawn sleeves." The Archbishop answered, "And I hate a knave in any sleeves." This disgrace did not deprive him of the Mastership of the Rolls, that office having been conferred upon him for life. Though Lord Raymond names him as joined with the three chiefs as Commissioner of the Great Seal on the dismissal of Lord Somers in 1700, the "Crown Office Minute-book" proves that the appointment was to the three chiefs alone, his commission being solely to hear causes till a new Lord Keeper was appointed. He continued Master of the Rolls for twenty-two years after his expulsion.—*Foss's Lives of the Judges.*

1. Edward Ward is described by Noble (Granger, ii. 181) as a native of Northamptonshire; and Luttrell (iv. 277) says that in 1697 he purchased an estate in that county of 2,000*l.* a year. He was called to the bar by the Inner Temple in 1670, and soon got into good practice. The tendency of his political opinions may be inferred from his being engaged by Lord Russell to argue points of law on his trial in 1683. In 1687 Ward was elected a Bencher of his Inn, and at the Revolution he modestly declined a judgeship that was offered to him. But on March 30, 1693, he accepted the office of Attorney General; and on June 8, 1695, he was appointed Chief Baron of the Exchequer, and knighted. In this office he remained during King William's life and nearly all the reign of Queen Anne. For a brief interval of three weeks in May, 1700, he held the Great Seal as one of the Commissioners. He seems to have been an honest and intelligent judge, with sufficient legal knowledge and discretion; but his name is not distinguished by any prominence of character.—*Foss's Lives of the Judges.*

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May 21.

but this was chiefly in the vacation between Easter Term and Trinity Term, and we have no report of any of their decisions. Holt was probably surprised to find that he got on so well as an Equity Judge, but he felt no regret in transferring the Great Seal to Sir Nathan Wright,¹ and returning to that court where he was sure both to decide properly and to decide with applause.

Nothing else very memorable occurred to Holt during the reign of William III. There seemed a probability of his being placed in a difficult and delicate position, as adviser to the Peers, upon the impeachment of Lord Somers; but he was relieved from this embarrassment by the quarrel between the two Houses, which put a sudden end to the trial.

He vetoes
a bill to
appoint the
Judges
during
good be-
havior.

It is a curious fact that our "Deliverer," although professing such a regard for liberty, actually *vetoes* a bill passed by the two Houses of Parliament to appoint the Judges *quamdiu se bene gesserint*, and still insisted on their holding during pleasure as long as he himself should rule, although he agreed to a clause in the "Act of Settlement," providing, that after the limitation of the Crown, thereby introduced, should take effect, they should only be removable on the address of the two Houses of Parliament.² It may add to our

1. Sir Nathan Wright (1653-1721) was called to the bar in 1677. He assisted at the trial of the Seven Bishops. In 1697 he was created King's Sergeant, and on the dismissal of Somers he was appointed Lord Keeper of the Privy Seal. In 1702 we find him addressing the commission which had been appointed to frame the union with Scotland. He rendered himself objectionable by his partisanship of the Church. He was restricted to silence in the Upper House, where he performed the duties of a Speaker, for want of a peerage. We find him accused of leaving out, in his list of the Justices of the Peace, all who were not of Tory politics. He was removed in 1705. Mr. Wyon says of him that "his legal acquirements were below the requisite standard, and his character for meanness and avarice ill qualified him to preside over the most august assembly in the kingdom."—*Low and Pulling's Dict. of Eng. Hist.*

2. 12 & 13 W. III. c. 2.



WILLIAM III.
AFTER SIR GODFREY KNELLER.



admiration of Holt's independent conduct on the bench, that he might have forfeited his office by displeasing the Government; but as the arbitrary dismissal of Common-law Judges had been one of the loudest complaints against James II., the actual peril that a Revolution judge ran must have been very inconsiderable.

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On the accession of Queen Anne, Holt was immediately reappointed, and under her he continued Chief Justice of England for eight years longer, with unabated energy and still increasing reputation.

March 8,
1702.
Accession
of Queen
Anne.
Holt reappointed
Chief Justice.

The two Houses of Parliament were soon in an unprecedented state of antagonism to each other. From the appointment of Whig bishops, from the elevation of some good Whigs to the peerage, and, I must add, from the superior intelligence which then distinguished the high aristocracy of England,—among the Lords there was a decided majority who supported Whig principles. But Anne's first House of Commons was filled with men of whom Addison's "Tory Fox-hunter" and Fielding's "Squire Western" might be considered fair types,—ignorant, bigoted, and factious,—professing a love for Church and Queen, but mostly Jacobites in their hearts,—and, although only secretly drinking to "the King over the water," openly professing an abhorrence of Dissenters, among whom they classed all men of tolerant religious feelings. Their grand scheme was to perpetuate their power by disqualifying all who did not take the sacrament according to the rites of the Church of England from being either electors or representatives, and by deciding on every controverted election in favor of their own partisans. In consequence, Tory candidates with only a small minority of electors in their favor, by making corrupt bargains with returning officers, were sent to parliament; and

A majority
of Whigs
in the
House of
Lords, and
of Tories
in the
House of
Commons.

Corrupt
decisions of
the House
of Commons
in
election
cases.

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Under these circumstances began the contest about parliamentary privileges which has rendered the name of Holt so illustrious. In the course of it he committed some errors, and his zeal was sometimes that of an advocate eager for victory, rather than of a magistrate only desirous of justice; but on the whole he showed great discrimination as well as intrepidity, and deservedly earned the glory which he acquired.

The Aylesbury Case, A.D. 1704.

Qu. whether an action could be maintained by an elector against a returning officer for refusing his vote?

One of the most corrupt returns was by the Bailiffs of Aylesbury. The defeated candidates, who had a considerable majority of legal votes, being Whigs, knew that it would be in vain to petition the House of Commons, and it was resolved that several of the electors whose votes had been rejected should respectively bring actions, in the Court of Queen's Bench, against the returning officers. In the first of these, one *Ashby* was the plaintiff, and he, clearly making out his case before a jury, recovered a verdict with large damages. The defendants then moved in arrest of judgment, on the ground that, although all the facts alleged by the plaintiff were true, an action at law could not be maintained by him, and that the only remedy was by petition to the House of Commons.

The three Puisne Judges in the negative.

The three Puisne Judges associated with Holt were respectable men, but they labored under a suspicion of being Toryishly inclined; and, being rather of timid minds, they were alarmed by a species of action which had not been brought hitherto, although the principle on which it rested was as old as the law itself; and they severally gave opinions in favor of the defendants,—assigning very weak and inconsistent reasons. Holt, of a bold and masculine understanding, as well as a deep lawyer, saw that, a private injury being sustained from breach of duty in a public officer, compen-

sation ought to be given by legal process; and I make no doubt that his indignation was exalted by the thought that he was now resisting an attempt to deprive the subject of legal redress against a corrupt and arbitrary system of government established by a faction in the House of Commons. Knowing that he was to be overruled in his own court, thus, in a noble strain of judicial eloquence, he poured forth arguments and authorities which he hoped might prevail in a superior tribunal, and which he was sure would justify him to his country :

Holt, C. J.: "The single question is, whether if a free bur-
gess of a corporation, having an undoubted right to give his vote *Holt*
in the election of a representative of the borough in parliament, *contra.*
be maliciously hindered from giving it by the returning officer, he may maintain an action against the returning officer for the injury he has suffered? I am of opinion that judgment ought to be given for the plaintiff. My brothers differ from me in opinion, and they all differ from one another in the reasons for the opinion they have expressed. My brother Gould thinks no action will lie against the defendant, because, as he says, he is a judge; my brother Powys indeed says he is no judge, but *quasi* a judge; while my brother Powell thinks that the defendant is neither a judge nor anything like a judge, but only an officer to execute the precept, to give notice to the electors of the time and place of election, to assemble them together in order to elect, to cast up the poll, and to declare which candidate has a majority. First, I will maintain that the plaintiff has a right to give his vote. Secondly, that being wrongfully hindered in the enjoyment of that right, the law gives him this action for redress :
1. From what my brothers have said, I find that I must begin to prove that the plaintiff had a *right* to vote. It is not to be doubted that the Commons of England form a part of the government, and have a share in the legislature, without whom no law passes; but, because of their numbers, this power is not exercisable by them in their proper persons, and therefore by the constitution of England it is to be exercised by representatives chosen by and out of themselves, who have the whole power of all the Commons of England vested in them. Knights of the shire, citizens of cities, burgesses of boroughs, duly elected,

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Holt
contra,
continued.

form the Commons' House of Parliament." After entering at great length into the history of the representation of counties, cities, and boroughs, he continues: "Hence it appears that every man that is to give his vote in the election of members to serve in parliament has a several and particular right in his private capacity as a freeholder, citizen, or burgess. And, surely, it cannot be said that this is so inconsiderable a right as to apply that maxim to it, *de minimis non curat lex*.¹ A right that a man hath to give his vote at the election of a person to represent him in parliament, there to concur in the making of laws which are to bind his liberty and his property, is of a transcendent nature, and its value is set forth in many statutes. Thus 34 & 35 H. VIII. c. 13, giving Members of Parliament for the first time to Cheshire, says that, 'for want thereof, the inhabitants have sustained manifold dishonors, losses, and damages, as well in their lands, goods, and bodies, as in the civil and politic governance of the commonwealth of their said county.' Here, therefore, is a *right*. 2. If the plaintiff has a right, he must of necessity have means of vindication if he is injured in the exercise or enjoyment of it. Right and remedy, want of right and want of remedy, are reciprocal. It would look very strange, when the commons of England are so fond of sending representatives to parliament, that it should be in the power of a sheriff or other returning officer to deprive them of such right, and yet that they should have no redress: this would be a thing to be admired at by all mankind. My brother Powell, indeed, thinks that an action on the case is not maintainable because here is no hurt or damage to the plaintiff: but, surely, every injury imports a damage; a damage is not merely pecuniary; an injury imports a damage when a man is thereby hindered of his right. For slanderous words, though a man does not lose a penny by the speaking of them, yet he shall have an action, because the right to his fair fame is injured. So, if a man receives a slight cuff on the ear, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal injury. It is no objection to say this leads to multiplicity of actions; for if men will multiply injuries, actions must be multiplied too. Every man injured ought to have his recompense. But, says my brother Powys, 'we cannot judge of this matter, because it is a parliamentary thing.' O! by all means be very tender of that!

1. "The law does not regard very minute or trivial affairs."

But this matter never can come in question in parliament, and there the plaintiff could receive no compensation for the wrong he has suffered. To allow this action will make public officers more careful to observe the constitution of cities and boroughs, and not to be partial at all elections, which is, indeed, a great and a growing mischief, and tends to the prejudice of the peace of the nation. I agree we ought not to enlarge our jurisdiction ; by so doing, we usurp both on the right of the Queen and the people. But this is a matter of property determinable before us, and we are bound by our oaths to judge of it. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote and praying them to give him remedy? The Parliament undoubtedly would say, 'take your remedy at law.' It is not like the case of determining the merits of the return between the candidates. This privilege of voting does not differ from any other franchise whatsoever. We do not deny to the House of Commons their jurisdiction to determine elections ; but we must not be frightened, when a matter of property comes before us, by saying, 'it belongs to the Parliament.' The Parliament cannot judge of this injury, nor give the plaintiff damages for it. If a returning officer corruptly refuses a vote, and is sued before me, I will direct the jury to make him pay well for it. It is a great privilege to choose such persons as are to bind a man's life and property by the laws they make. This privilege, belonging to the plaintiff, has been wantonly violated by the defendant ; and I am of opinion that, instead of arresting the judgment, we ought to allow the plaintiff to have execution for the damages which the jury has awarded to him."

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Holt
contra,
continued.

Judgment, however, was arrested, and such a triumph was this considered to the Tory party, that it was celebrated by bonfires all over the country. But a writ of error was brought into the House of Lords, where the Whigs had the ascendancy.

At the hearing the Judges were called in, and nine attended. Holt adhered to his opinion, and was supported by Barons Bury and Smith,¹ while Justices

Judgment
of the
King's
Bench re-
versed in
the House
of Lords.

1. Thomas Bury, the youngest son of Sir William Bury, knight, of Linwood in Lincolnshire, was born in 1655, and, entering Gray's Inn in 1668, was called to the bar in 1676. After twenty-four years' practice he obtained the degree of Sergeant in 1700, and on January 26 of the next

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Trevor and Price¹ agreed with the three Puisnies of the Queen's Bench. Lord Somers, now an ex-Chancellor, ably expounded the law, and enforced the arguments in favor of a reversal of the judgment; while Lord Keeper Wright, his successor, not being a peer,

year he was made a Baron of the Exchequer. Speaker Onslow in his notes to Burnet states that it was said that it appeared by Bury's "Book of Accounts" that Lord Keeper Wright had 1,000*l.* for raising him to the Bench. This discreditable story, however, depends on very slight testimony. The new Baron was of course knighted, and sat in that court during the remainder of his life; for fifteen years as a Puisne Baron, and for six as Chief Baron, to which he was advanced on June 10, 1716. In the famous Aylesbury case in the House of Lords he supported the opinion of Chief Justice Holt, when the judgment which he had opposed was reversed. He died on May 4, 1722, and was buried at Grantham, where there is a handsome monument to his memory.—*Foss's Lives of the Judges.*

John Smith is distinguished by having held a judicial seat in each of the three kingdoms. He was the son of Roger Smith, Esq., of Frolesworth in Leicestershire, and went through his legal training at Gray's Inn, by which society he was called to the bar on May 2, 1684. He was sent as a Judge of the Common Pleas to Ireland on Dec. 24, 1700. In less than a couple of years he was recalled and made a Baron of the English Exchequer on June 24, 1702. In the great case of Ashby and White on the Aylesbury election, he opposed the judgment of the three Puisne Judges of the Queen's Bench, concurring in the opinion of Chief Justice Holt in favor of the voter who had been deprived of his franchise by the returning officer. The reversal of that judgment and the confirmation of Holt's opinion by the House of Lords was then represented as a Whig triumph, but must be considered, now that party spirit no longer is predominant, as a triumph of common-sense over a fanciful claim of privilege by the House of Commons. In May, 1708, he was selected to settle the Exchequer in Scotland, and was sent as Lord Chief Baron for that purpose, being still allowed, though another Baron was appointed here, to retain his place in the English court, and receiving 500*l.* a year in addition to his salary. He enjoyed both positions till the end of his life, being resworn on the accession of George I. in his office of Baron of the English Exchequer, although he performed none of its duties. He died on June 24, 1726, and by his will he founded and endowed a hospital at his native village of Frolesworth for the maintenance of fourteen poor widows.—*Foss's Lives of the Judges.*

1. Robert Price, a descendant from the ancient stock of one of the noble tribes of Wales, was the son of Thomas Price, of Geeler in Denbighshire, and of Margaret, daughter of Thomas Wynne, of Bwlch-y-Beyde in the same county. He was born in the parish of Cerrigy-Druidion on Jan. 14, 1653, and, after receiving his education at Wrexham, and St. John's College, Cambridge, he entered Lincoln's Inn in 1673. In 1677 he took the grand tour, and spent two years in visiting all parts of

was condemned to silence. But little weight was given to reasoning or eloquence. It was made a mere party question, and, on a division, the judgment of the Court of Queen's Bench was reversed by a majority of 50 to 16.

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The Whigs were at this time very unpopular, and the decision was viewed with no favor by the public. It threw the House of Commons into a transport of fury, and after a long debate they resolved, by a majority of 215 to 97, "That the qualification of an elector is not cognizable elsewhere than before the Commons of England in Parliament assembled: that Ashby, having commenced an action against the Bailiffs of Aylesbury for rejecting his vote, is guilty of a breach of the privileges of this House: and that whosoever shall in future commence such an action, and all attorneys or councillors soliciting or pleading the same, are guilty of a breach of the privileges of

Absurd
resolutions
of the
House of
Commons.

France and Italy. Among the books which he took with him was Coke upon Lyttleton, which the scrutinizing officers at Rome thought was an heretical English Bible, and seizing it carried off its possessor to the Pope. Mr. Price soon satisfied his Holiness that the laws it illustrated, though not divine, were orthodox; and presenting it to the holy Father, it is to be hoped that it still graces the Vatican Library. On his return he was called to the bar in July, 1679. He was made Attorney General of South Wales in 1682, and Recorder of Radnor in the following year. He was complimented also by being elected alderman of Hereford, about five miles from his seat at Foxley. On the death of Charles II. King James appointed him Steward to the Queen Dowager, and King's Counsel at Ludlow. King William removed him from his Welsh Attorney-generalship. On the accession of Queen Anne, Mr. Price was constituted a Baron of the Exchequer on June 14, 1702. In this court he remained the whole of that reign and nearly to the end of the next, when he obtained a removal into the Common Pleas on Oct. 16, 1726. In 1718 he and Mr. Justice Eyre were the only two judges who gave an opinion adverse to the King's claim of prerogative with regard to the education of the royal grandchildren, and supported their view by an able argument delivered to his Majesty. George II. was of course impressed in his favor, and on coming to the crown continued him in his place, which he filled during the remainder of his life. After a long judicial career of no less than thirty-one years, he died on Feb. 2, 1733, and was buried in the church of Yazor in the county of Hereford.—*Foss's Lives of the Judges.*

CHAP. XXIV. this House, for which they may expect condign punishment."

The conduct of the Commons upon this occasion cannot be too severely reprobated. They wantonly rushed into a controversy with the Courts of Law and with the Upper House of Parliament. The action brought against the returning officer did not in the slightest degree interfere with any of their functions or any of their privileges; and the House of Lords, in reversing the judgment of the Queen's Bench, had done no more than their duty, in soundly expounding the law, and administering justice to a suitor at their bar. The intemperate resolutions passed had a strong tendency to bring parliamentary privilege into public odium, and to invite dangerous attacks upon it. They were prompted, not by any respect for freedom, but by the desire to perpetuate the power of a faction.

Counter-resolutions
of the
House of
Lords.

The Lords perhaps would have done well if they had treated this foolish proceeding with silent contempt; but they appointed a committee, who reported that "the Commons thereby assumed a power to control the law and to pervert justice." A sudden prorogation of Parliament suspended the controversy.

March.

During the recess, the current of popular opinion turned strongly against the House of Commons; and various constituencies announced their determination, upon a dissolution of Parliament, to return Whig representatives, who might rescind the obnoxious resolutions. Encouraged by this spirit, *Paty*, and several other electors of Aylesbury, whose votes had been illegally rejected like Ashby's, brought fresh actions against the returning officer.

Nov. 4.

As soon as Parliament again met, these plaintiffs were all committed to Newgate, "being guilty of commencing and prosecuting actions at law for not allowing their votes in the election of members to serve in

parliament, contrary to the declaration, in high contempt of the jurisdiction, and in breach of the known privileges of this House." The captives having sued out writs of *habeas corpus* in the Queen's Bench, the keeper of the jail produced them, and made a written return, setting out at full length the above warrant, under which they were arrested and detained. They then moved that they might be set at liberty, on the ground that their imprisonment was unlawful, as the warrant showed that they had been unlawfully committed for bringing actions which the highest tribunal of the country had decided to be competent. On account of the high importance of the question, a meeting was called of the twelve Judges, to whom it was submitted, and eleven of them properly held that no court of law could inquire into the merits of a commitment by either House of Parliament, for the same point had been solemnly decided in Lord Shaftesbury's case; and it is clear that the contrary doctrine subjects all parliamentary privilege to the control of the Common-law Judges, who are supposed to be unacquainted with the subject. Holt, C. J., however, refused to acquiesce in this opinion, and was for setting the prisoners at liberty:

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Writs of
habeas
corpus by
the Ayles-
bury men.

"The legality of the commitment," said he, "depends upon the vote recited in the warrant; and, for my part, I must declare my opinion to be, that the commitment is illegal, although sorry to go contrary to an act of the House of Commons and the opinion of all the rest of the Judges of England. This is not such an imprisonment as the freemen of England ought to submit to. The prisoners have done that which was legal according to the highest tribunal of the country, and which the House of Commons alone could not make illegal. Both Houses jointly cannot alter the law so as to affect the liberty or property of the subject; for this purpose, the Queen must join. The necessity for the concurrence of the three branches of the legislature constitutes the excellence of our

Holt's
opinion for
discharg-
ing them.

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Holt's
opinion,
continued.

constitution. How can the bringing of an action at law for not allowing a vote in the election of members of Parliament be a breach of privilege? The returning officer of a borough is not a servant of the House of Commons, is not acting by their authority, and cannot be clothed with any privilege by them. To bring an action against a person who has no privilege, cannot be a breach of privilege, whether the action is maintainable or not. If a peer be charged with any false and scandalous matter, yet if it be by way of action he cannot have *scandalum magnatum*. But the plaintiffs here have a good cause of action, as we know by the judgment in *Ashby v. White*. The declaration of the House of Commons will not make that a breach of privilege which was none before. The privileges of the House of Commons are well known, and are founded upon the law of the land, and are nothing but the law. We all know that the members of the House of Commons have no protection from arrest in cases of treason, felony, or breaches of the peace; and if they declare they have privileges which they have no legal claim to, the people of England will not be estopped by that declaration. This privilege of theirs concerns the liberty of the people in a high degree, by subjecting them to imprisonment for that which heretofore has been lawful, and which cannot be made unlawful without an act of Parliament. As to the House of Commons being judges of their own privileges, I say they are so when a question of privilege comes before them. The Judges have been cautious in giving an answer in Parliament in matter of privilege of Parliament. But when such matter arises before them in Westminster Hall, they must determine it. Suppose the actions had proceeded, and the privilege had been pleaded as a defence, we must have given judgment whether it exists or not. Why are we not to adjudge on the return to the *habeas corpus*? The matter appears on the record as well this way as if it were pleaded to an action. We must take notice of the *lex parliamenti*, which is part of the law of the land. As to what my Lord Coke says, that the *lex parliamenti est a multis ignorata*,¹ that is because they will not apply themselves to understand it. If the votes of both Houses cannot make law, by parity of reason they cannot declare it. The judgment in *Ashby v. White* proves that such an action is no breach of the privileges of the Commons. Why did they not commit him when he

1. "Many are ignorant of parliamentary law."



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brought the action? The suffering of him to go on with his action is a proof that this pretence of privilege is a new thing. These men have followed his steps, and yet they are said to have acted in breach of the privileges of the Commons. The Commons may commit for a crime; but not without charging that a crime has been perpetrated. Lord Shaftesbury was committed for a contempt done in the House. Here the cause of the commitment being expressed in the warrant, we are precluded from presuming that it was for something criminal of which the Commons could take notice. I am therefore of opinion that the prisoners ought to be set at liberty."

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This doctrine seems plausible as well as bold, but, when examined, will be found contrary both to sound reason and to authority; for if the sufficiency of the cause of commitment by either House of Parliament can be examined on a return to a *habeas corpus*, then all parliamentary privilege would be determinable without appeal by every court, and by every single judge, in whom the power of granting a writ of *habeas corpus* is vested; and the two Houses of Parliament, deprived of the power of commitment for a contempt, which belongs to inferior tribunals, could not effectually exercise the functions assigned to them by the constitution. There must be a possibility of the abuse of power wherever it is given without appeal, and in certain cases it must be so given under every form of government. One of these is the power of a supreme legislature, or any branch of it, to judge of its own privileges.

According to the opinion of the eleven Judges, Paty and the other prisoners were remanded on the ground that "the cause of their commitment was not within the jurisdiction of the Court of Queen's Bench."¹

He is over-
ruled by all
the other
Judges.

1. 2 Lord Raym. 1116. This decision has been acquiesced in ever since. Recently, some Judges have held out a threat that if the cause of commitment expressed in the warrant appears to them not to amount properly to a breach of parliamentary privilege they would discharge the prisoner; but such an attempt at usurpation is effectually guarded

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Qu. whether writ of error lies on a judgment on a return to a writ of *habeas corpus*?

Encouraged, however, by the opinion of Holt, and anticipating a favorable consideration from the rival branch of the legislature, *Paty*, and the other Aylesbury men, when recommitted to Newgate, resorted to the attempt of bringing a writ of error to the House of Lords on the decision of the Court of Queen's Bench. No such writ of error had ever been before brought, and the proceeding involved the most serious consequences. Sir Nathan Wright, who was then Lord Keeper of the Great Seal, summoned a meeting of the twelve Judges to advise him whether *ex debito justitiæ*¹ the writ should issue?

Although there was no precedent for such a proceeding, Holt eagerly supported it, and, without giving any decided opinion that the judgment of the Queen's Bench could thus be reviewed, he said that "at all events the writ ought to issue, and that the House of Lords would decide whether they had jurisdiction or not." In this opinion he at last induced all the Judges except one to concur.

Commitments of counsel by the Commons.

The Commons were in a fury. They immediately made out warrants of commitment against the counsel in support of the application, two of whom were lodged in Newgate. The third made his escape from the Sergeant-at-arms by letting himself down from a high window in the Temple with the assistance of a rope and his bedclothes. Some violent Tory members even intimated a determination to move the commitment of Holt the Chief Justice himself, whom they considered the mortal enemy of their privileges. Nay, the following narrative is actually to be found in

against by the practice which I had the honor to introduce in the case of the Sheriffs of Middlesex, arising out of the famous case of *Stockdale v. Hansard*, of returning to the *habeas corpus* in general words a commitment for *breach of privilege*,—which is allowed, on all hands, entirely to oust the jurisdiction of the common-law courts.

1. "From what is due to justice."

various books of anecdotes, it having been copied, CHAP. XXIV. without inquiry, from one into another :

"The Sergeant-at-arms of the Commons presented himself before Chief Justice Holt, sitting on his tribunal, and summoned him to appear at the bar of the House to purge himself of his share of the contempt. That resolute defender of the laws said, with a voice of authority, 'Begone!' Soon after came the Speaker in his robes and full-bottom wig, attended by many high-privilege members, and said, 'Sir John Holt, Knight, Chief Justice of her Majesty's Court of Queen's Bench, in the name of the Commons of England, and by their authority, I summon you forthwith to appear at the bar of the House to answer the charge there to be brought against you for divers contempts by you committed in derogation of their ancient and undoubted privileges.' His Lordship calmly replied to him in these remarkable words: 'Go back to your chair, Mr. Speaker, within these five minutes, or you may depend upon it I will lay you by the heels in Newgate. You speak of your authority, but I tell you that I sit here as an interpreter of the laws and a distributor of justice, and if the whole House of Commons were in your belly I would not stir one foot.' The Speaker, quailing under this rebuke, quietly retired with his high-privilege body-guard; and the Commons, terrified to contend longer with such an antagonist, let the matter drop."

But an inspection of the Journals proves that no such proceedings ever took place, and shows what the real catastrophe was. The two Houses, after a series of hostile resolutions and counter-resolutions, seemed ready to come to open war, the Commons setting writs of *habeas corpus* at defiance, and the Lords seeming determined to storm "Little Ease," in which a counsel was imprisoned for acting in obedience to their authority. As a preliminary step, they presented an address to the Queen, praying her Majesty to issue the writ of error to reverse the judgment of the Queen's Bench. The Queen returned for answer, "that she saw an absolute necessity for putting an immediate end to the session of Parliament."

A dissolution almost immediately followed, and

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April 3,
1705.
The abuse
of privilege
by the
House of
Commons
remedied
by public
opinion on
a general
election.]

Holt again
refuses the
Great Seal.
Oct. 11.

such was the reaction that the new elections turned out greatly in favor of the Whigs. In consequence, the Administration was remodelled, and, Lord Keeper Wright being dismissed, the Great Seal was again offered to Sir John Holt. He was now so popular, and so much respected by all parties, that his accession to a political office would have strengthened the Whig Government; and Lord Godolphin,¹ and the Duchess of Marlborough² in the zenith of her sway, pressed him to accept it on any terms he might demand; but he said he was now more unfit for it than ever, as years and infirmities were coming upon him, and it was a day too late for him to be entering on a new career. Sarah thereupon gave the Great Seal to

1. Sydney, Lord, afterwards Earl, Godolphin (1640-1712), was educated as a page at Whitehall. In 1664 he became First Commissioner of the Treasury. In 1678 he was sent as envoy to Holland, and on his return was sworn of the Privy Council. He became Secretary of State in 1684, and in the same year, on the resignation of Rochester, he took his place on the Commission of the Treasury. On the accession of James he was removed from the Treasury and made Chamberlain to the Queen. In his official capacity he did not scruple to conform to Roman Catholic observances. On the accession of William and Mary the Treasury business was placed in his hands. He had a large share of William's confidence, but, influenced by Marlborough, he intrigued with the Jacobites. In 1697 he was dismissed from office. When Queen Anne succeeded to the throne (1702) he became Lord High Treasurer. During the tumult that followed Sacheverell's trial, both he and Marlborough intrigued with the Jacobite Court at St. Germain.—*Low and Pulling's Dict. of Eng. Hist.*

2. Sarah, Duchess of Marlborough (1660-1744), at an early age entered the household of the Duchess of York. There she became the companion and friend of the Princess Anne, who became passionately attached to her. So intimate were they that they afterwards, as is well known, corresponded under the names of Mrs. Morley and Mrs. Freeman. In 1678 Sarah Jennings married Colonel John Churchill, afterwards Duke of Marlborough. On the accession of Queen Anne the Duchess became Mistress of the Robes. She soon proved herself a violent Whig, and had frequent disputes with her mistress, in which Marlborough was not unfrequently involved. She gradually found herself supplanted in the royal favor by Mrs. Abigail Hill, a poor relation of her own, whom she had introduced into the household. Of the numerous sketches of her character, the most famous is that of Pope in the *Essay on Woman*, where she is satirized under the name of "Atossa."—*Low and Pulling's Dict. of Eng. Hist.*

young Mr. Cowper, of whose youthful beauty she was supposed to be innocently enamoured, and Holt was quietly permitted to end his days as Chief Justice.¹

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When the new Parliament met, a large majority of Oct. 25. the members were found to disapprove the proceedings of the last House of Commons in the Aylesbury Case; and the plaintiffs in the additional actions, having been discharged out of custody at the termination of the session, were allowed to obtain verdicts and execution against the returning officer without further disturbance. The abuse of privilege by the Commons thus met with its proper corrective.

I cannot altogether defend Holt in this controversy. His judgment in *Ashby v. White* was undoubtedly just. In the subsequent proceedings, although his courage is to be admired, it can hardly be denied that he was carried too far by his Whig zeal against a Tory House of Commons. All that he did, however, was vigorously defended by that great constitutional authority, Lord Somers. For above a century the view of privilege taken by the eleven Judges who differed from him was implicitly followed, but there has recently² been a contrary tendency, which became rather rampant till checked by the interference of the legislature³ and the superintendence of a court of error.⁴

Holt's conduct in the privilege controversy.

1. Lives of the Chancellors, iv, ch. cxiv.; 6 Parl. Hist. 225; 14 St. Tr. 695.

2. Lord Ellenborough was the first to countenance the notion of examining the commitments of the Houses of Parliament by putting an extreme case: "If a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that court nor of any other of the superior courts inquire further; but if it did not profess to commit for a contempt, but for some other matter appearing on the return which could by no reasonable intendment be considered as a contempt of the court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law and natural justice, we must look at it and act upon it as justice may require, from whatever court it may profess to have proceeded."—*Burdett v. Abbott*, 14 East, 150.

3. 3 Vict. c. ix.

4. *Howard v. Gosset*.

CHAPTER XXV.

CONCLUSION OF THE LIFE OF LORD CHIEF JUSTICE
HOLT.

CHAP. XXV. HOLT survived this controversy nearly five years, and continued to discharge his judicial duties with undiminished ability and credit; but no other case of great permanent interest arose before him, and he was not in any way mixed up with the important political events which render the latter portion of the reign of Queen Anne so interesting. He adhered steadily to the Whig party, without incurring the slightest suspicion of partiality while presiding on the bench, and he steered clear of all the intrigues by which they rose or fell. From his manly good sense, he must have sadly lamented their imprudent impeachment of Sacheverell;¹ but he was snatched away before their ruin

Remainder of Holt's judicial career.

A.D. 1710.

1. Henry Sacheverell (1674-1724), an English church and state politician of extreme views, was born in 1674, the son of Joshua Sacheverell, rector of St. Peter's, Marlborough, who at his death left a large family in poverty. Henry matriculated at Magdalen College, Oxford. He first came into notice when holding a preachingship at St. Saviour's, Southwark. His famous sermons on the church in danger from the neglect of the Whig ministry to keep guard over its interests were preached, the one at Derby, August 14, the other at St. Paul's Cathedral, November 5, 1709. As the passions of the whole British population were at this period keenly exercised between the rival factions of Whig and Tory, the vehement invectives of this furious divine on behalf of an ecclesiastical institution which supplied the bulk of the adherents of the Tories made him their idol. The Whig ministry, then slowly but surely losing the support of the country, were divided in opinion as to the propriety of prosecuting this zealous parson. Somers was against such a measure; but Godolphin, who was believed to be personally alluded to in one of these harangues under the nickname of "Volpone," urged the necessity of a prosecution and gained the day. The trial lasted from February 27 to March 23, 1710, and the verdict was that Sacheverell should be suspended for three years and that the two sermons should be burnt at the

was consummated by this irreparable blunder. Having been summoned to attend the trial with the other Judges in the House of Lords,—when it was about to commence he was struck with a mortal disorder. The last day that he ever sat in court was the 9th of February, 1710, and at three o'clock in the afternoon of the 5th day of March following he expired, at his house in Bedford Row,¹ in the sixty-eighth year of his age.

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His death.

Notwithstanding the factious excitement which then prevailed, the death of this great magistrate produced a deep sensation in the public mind, and the regret of the Tories was embittered by seeing his office given as a reward for the violence with which Sergeant Parker had assailed Dr. Sacheverell and high-Church principles. Both parties united in showing respect for the memory of the departed Chief Justice. The interment was to take place at Redgrave, in Suffolk; and not only all the heads of the law, with the barristers and students, but the principal nobility and gentry in London, of all shades of political opinion, attended the funeral procession several miles from the metropolis. The admirers of Sacheverell asserted that if Lord Chief Justice Holt's life had been spared, and he had attended the pending trial, he who had boldly withstood either House of Parliament would have lifted up his voice against this iniquitous prosecution, and declared that the champion of the Church had done nothing worthy of death or of bonds; while the Whigs retorted, that

His
funeral.

Royal Exchange. This was the decree of the state, and it had the effect of making him a martyr in the eyes of the populace, and of bringing about the downfall of the ministry. Immediately on the expiration of his sentence (April 13, 1713) he was presented to the valuable rectory of St. Andrew's, Holborn, by the new Tory ministry, who despised the author of the sermons, although they dreaded his influence over the mob. He died at the Grove, Highgate, June 5, 1724.—*Encyc. Britannica*, vol. xxi. p. 130.

1. Then called Bedford Walk. See 2 Lord Raym. 1389.

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His
funeral,
continued.

a solemn proceeding instituted to vindicate the principles of the Revolution would have been warmly countenanced by him who had resisted the tyranny of James II., who had been a distinguished member of the Convention Parliament, whose arguments had mainly contributed to the vote that *the throne was vacant*, and who, during his long career, had never swerved from the true principles of civil and religious liberty.¹

After reaching Highgate, the hearse was accompanied only by the brother of the deceased and a few private friends till it approached the place of its destination, when it was met by an immense assemblage from the surrounding country. The manor of Redgrave is famous in our judicial annals. It had belonged to Lord Keeper Sir Nicholas Bacon; and here he had entertained Queen Elizabeth—when, in answer to her observation that “his house was rather too small for him,” he replied “Your Majesty has made me too great for my house.” From the family of the Bacons it had been purchased by Chief Justice Holt, and here he spent his vacations as a private gentleman, mixing familiarly with all ranks, and particularly with the more humble. All the inhabitants of this and the adjoining parishes, as if by one impulse, were now congregated to do honor to him whose face they were to see no more, but whose virtues they were to talk of to their children’s children. They cared little about his political conduct, but they had heard, and they believed, that he was the greatest Judge that had appeared on the earth since the time of Daniel, and they knew that he was condescending, kind-hearted,

1. This seems to have been an anticipation of the contest between Whigs and Tories three years later, when the tragedy of CATO was brought upon the stage. “The Whigs applauded every line in which Liberty was mentioned, as a satire on the Tories; and the Tories echoed every clap, to show that the satire was unfelt.”

and charitable. We are told that as the body was lowered into the grave prepared for it, in the chancel of the church at Redgrave, not a dry eye was to be seen, and the rustic lamentations there uttered eloquently spoke his praise.

There is now to be admired a magnificent monument of white marble, which his brother erected over his grave at a cost of 1,500*l.*, representing him in his judicial robes under a canopy of state, seated between emblematical figures of JUSTICE and MERCY, with the following inscription :

"M. S.
Johannis Holt Equitis Aur.
Totius Angliæ in banco regio
Per xxi. annos continuos
Capitalis Justiciarii
Gulielmo Regi, Annæ Reginæ
Consilarii perpetui,
Libertatis ac legum Anglicarum
Assertoris, Vindicis, Custodis
Vigilis, acris, et intrepidi.
Rolandus frater unicus et hæres
Optime de se merito
Posuit." ¹

This praise is certainly well deserved. I should have been glad if the epitaph could have truly added that he was an elegant scholar, an enlightened philosopher, a splendid orator, or a distinguished writer. Agreeing with Speaker Onslow, that "he was not of very enlarged notions," I would not add, "the *better judge*, whose business it is to keep strictly to the plain and known rules of law." According to a pithy expression which I have several times heard from the late Daniel O'Connell, "a judge must be a downright *tradesman*," meaning "the first and indispensable qualification of a judge is that he should thoroughly understand his profession;" and, if he is at all induced to neglect his judicial duties by the allurements of

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His monu-
ment.

Holt's
want of
literature
and
science.

1. Biographia Brit.

CHAP. XXV. literature and science, or the dangerous ambition of *universality*, it would be much better that he had taste for nothing more refined than the YEAR-BOOKS. But there is no absolute incompatibility between the profoundest knowledge of jurisprudence and any degree of culture and accomplishment. We can conceive that Holt, like Somers, might have been President of the Royal Society,¹ and a member of the Kit-Cat Club.² But he seems to have been wholly unacquainted with the philosophers and wits who illustrated the reigns of King William and Queen Anne; and Steele, who celebrates him in the TATLER, evidently speaks of VERUS only as an idol whom he had seen and worshipped from a distance. We are left to conjecture as to his habits; but he must have had benchers and

1. The Royal Society grew out of two small groups of friends who met occasionally in London and Oxford to discuss scientific questions about the middle of the seventeenth century. These were organized into a definite society in 1660; in 1662 it was granted a charter by Charles II., and incorporated as the Royal Society. The King, as well as his brother James, placed their names in the list of members. Its early meetings took place in Gresham College, and afterwards in Crane Court; they were transferred in 1782 to Somerset House, and to Burlington House in 1857—*Low and Pulling's Dict. of Eng. Hist.*

2. Kit-Kat Club was a celebrated association in London, founded about the year 1700, and said to have derived its name from a certain Christopher Katt, a mutton-pieman or pastry-cook, at whose house in Shire Lane the meetings of the club are supposed to have been first held. It was the chief society for the leaders among the Whigs, and originally consisted of thirty-nine noblemen and gentlemen known for their warm attachment to the house of Hanover. The Duke of Marlborough, Sir Robert Walpole, Addison, Steele, and many other noted men of the time were members; and the reputation of the club is literary and artistic as well as political. Here "used to meet many of the finest gentlemen and choicest wits of the days of Queen Anne and the first George. Halifax here conversed and Somers unbent, Addison mellowed over a bottle, Congreve flashed his wit, Vanbrugh let loose his easy humor, Garth talked and rhymed." Ward, who claims that the pieman was named Christopher, and that he lived at the sign of the Cat and Fiddle, in Gray's Inn Lane, says, "The cook's name being Christopher, for brevity called Kit, and his sign being the Cat and Fiddle, they very merrily derived a quaint denomination from puss and her master, and from thence called themselves of the Kit-Cat Club."—*Wheeler's Familiar Allusions*.



EARL OF GODOLPHIN.



sergeants-at-law for his companions, and his talk must have been of "contingent remainders." Yet he is the first man for a "mere lawyer" to be found in our annals. Within his own sphere he shone with unrivalled brightness. Perhaps he was carried too far by his admiration of the common law of England, as when he declared that an appeal of murder sued by the heir of the deceased, to be tried by battle, and excluding the Crown's power of pardon, instead of being an odious prosecution and a remnant of barbarism, was "a noble remedy, and a badge of the rights and privileges of an Englishman."¹ His head, likewise, seems to have been a little turned by the applause he received for his independence, inasmuch that he told Mr. Raymond (afterwards Lord Raymond, and his successor) that if the House of Lords had determined against him in a case of *Prohibition* which was clearly within their jurisdiction, he would not have held himself bound by their judgment;² but, generally speaking, he is to be considered a consummate jurist; above all prejudice; misled by no predilection; seeing what the law ought to be, as well as what it was supposed to be; giving precedent its just weight, and no more; able to adapt established principles to the new exigencies of social life; and making us prefer judge-made law to the crude enactments of the legislature.

He had the merit of effectually repealing the acts against witchcraft, although they nominally continued on the statute-book to a succeeding reign. Eleven poor creatures were successively tried before him for this supposed crime, and the prosecutions were supported by the accustomed evidence of long fasting, vomiting pins and tenpenny nails, secret teats sucked

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His unrivalled
brightness
in his own
sphere.

His
virtues.

He put an
end to
trials for
witchcraft.

1. *Sarah Stout's Case*, 1 Lord Raym. 557; 12 Mod. 373, 375.

2. 1 Lord Raym. 545.

CHAP. XXV. by imps, devil's marks, and cures by the sign of the cross or drawing blood from the sorceress—which had misled Sir Matthew Hale; but, by Holt's good sense and tact, in every instance the imposture was detected to the satisfaction of the jury, and there was an acquittal. One of the strongest *prima facie* cases made out before him was said to have been that against the woman to whom, many years before, he himself had pretended to be a wizard, and to whom he had given the cabalistic charm which was adduced as the chief proof of her guilt.¹ At last the Chief Justice effectually accomplished his object by directing that a prosecutor who pretended that he had been bewitched should himself be indicted as an impostor and a cheat. This fellow had sworn that a spell cast upon him had taken away from him the power of swallowing, and that he had fasted for ten weeks; but the manner in which he had secretly received nourishment was clearly proved. He, nevertheless, made a stout defence, and numerous witnesses deposed to his expectation of pins and his abhorrence of victuals, all which they ascribed to the malignant influence of the witch. The Judge, having extracted from a pretended believer in him the answer that "all the devils in hell could not have helped him to fast so long," and having proved, by cross-examining another witness, that he had a large stock of pins in his pocket, from which those supposed to be vomited were taken, summed up with great acuteness, and left it to the jury to say, not whether the defendant was bewitched, but whether he was *non compos mentis*, or was fully aware of the knavery he was committing, and knowingly wished to impose on mankind? The jury found a verdict of *guilty*, and, the impostor standing in the pillory to the satisfaction of the whole country, no female was ever

How he
accom-
plished his
object.

1. *Ante*, p. 133.

after in danger of being hanged or burned in England for being old, wrinkled, and paralytic.¹ CHAP.
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Holt's conduct on this occasion will appear the more meritorious if we consider that he ran great risk of being denounced as an atheist; and that, to avoid this peril, preceding Judges, who were not believers in witchcraft, had pandered to the prejudices of the vulgar. Says Roger North, "If a judge is so clear and open as to declare against that impious vulgar opinion that the Devil himself has power to torment and kill innocent children, or that he is pleased to divert himself with the good people's cheese, butter, pigs, and geese, and the like errors of the ignorant and foolish rabble, the countrymen cry, 'This judge hath no religion, for he doth not believe witches;' and so, to show they have some, *hang the poor wretches*."² His con-
duct on
this occa-
sion.

Holt seems to have had a high reputation among his contemporaries for detecting false pretences of all sorts, and exposing those who put on an aspect of extraordinary sanctity. There existed in his time a "society for the suppression of vice," composed of men who sought to cover their own bad characters and pernicious habits by affecting to put the law in force against others less culpable than themselves. Said Steele, describing the Chief Justice as VERUS, "He never searched after vice, nor spared it when it came before him; at the same time, he could see through the hypocrisy and disguise of those who have no pretence to virtue themselves but by their severity to the vicious. In his time there was a nest of pretenders to justice who happened to be employed to put things in a method for being examined before him. These animals were to VERUS as monkeys are to men: so like, that you can hardly disown them; but He ex-
posed hyp-
ocritical
pretenders
to ex-
traordinary
virtue.

1. 14 St. Tr. 639-605.

2. Life of Guilford, i. 251.

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so base, that you are ashamed of their fraternity. It grew a phrase, 'Who would do justice on the justices?' I have seen an old trial where he sat judge on two of them; one was called Trick-track, the other Tear-shift; one was a learned judge of sharpers, the other the quickest of all men at finding out a wench. Trick-track never spared a pickpocket, but was a companion to cheats. Tear-shift would make compliments to wenches of quality, but certainly commit poor ones. These patriots infested the days of VERUS, while they alternately committed and released each other's prisoners. But VERUS regarded them as criminals, and always looked upon men as they stood in the eye of justice, without respecting whether they sat on the bench or stood at the bar."¹

His antipathy to the "Prophets."

To a band of fanatics called the "Prophets" Holt had a particular antipathy. One of these, named Lacy, being beaten in a trial before him, complained of injustice. Calamy,² the famous Presbyterian divine, relates that, he having repeated these complaints to Holt, "My Lord by this time was moved; and, setting his hands to his side, cried out, *an honest cause did he call it?* I tell you, sir, and you have full liberty to tell him, or any one else you think fit, from me, that it was one of the foulest causes I ever had the hearing of, and that none but an arrant knave would have had the concern in it that Lacy had; for it was a plain design, in concert with a notorious jilt, to have cheated the right

1. Tatler, No. xiv. There must here be an allusion to some well-known "trading justices," belonging to a class who then and for many years after infested the metropolis, till stipendiary magistrates were at length established at Bow Street; but I have in vain endeavored to trace in "Magazines" and "Trials" the individuals whom Holt is here celebrated for having exposed and punished.

2. Edmund Calamy, an eminent Nonconformist divine, born in 1671. He became minister at Blackfriars, London, in 1692, and at Westminster in 1703. He published many sermons, "Baxter's Life and Times," "The Inspiration of the Scriptures," and other esteemed works. Died in 1732.—*Thomas' Biog. Dict.*

heir of a good estate upon his supplying her with money. If one that could do this may be allowed to set up for a prophet, the world is come to a fine pass."¹

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Holt having, some time after, committed another of this brotherhood, called *John Atkins*, to take his trial for seditious language, the same Lacy called at the Chief Justice's house in Bedford Row, and desired to see him. *Servant*: "My Lord is unwell to-day, and cannot see company." *Lacy* (in a very solemn tone): "Acquaint your master that I must see him, for I bring a message to him from the Lord God." The Chief Justice, having ordered Lacy in and demanded his business, was thus addressed: "I come to you a prophet from the Lord God, who has sent me to thee, and would have thee grant a *nolle prosequi* for John Atkins, his servant, whom thou hast sent to prison." *Holt, C. J.*: "Thou art a false prophet, and a lying knave. If the Lord God had sent thee, it would have been to the Attorney General, for he knows that it belongeth not to the Chief Justice to grant a *nolle prosequi*: but I, as Chief Justice, can grant a warrant to commit thee to bear him company." This was immediately done, and both prophets were convicted and punished.

His
detection
of a false
prophet.

It is observable that, even under Holt, criminal trials were not always conducted with the regularity and forbearance which we now admire. For the purpose of obtaining a conviction when he believed the charge to be well founded, he was not very scrupulous as to the means he employed. To the end of his life he persevered in what we call "the French system" of interrogating the prisoner during the trial, for the purpose of obtaining a fatal admission from him, or involving him in a contradiction. Thus in the case, which made a noise all over Europe, of HAAGEN

His prac-
tice of in-
terrogating
prisoners
on trial.

1. Rutt's Life of Calamy, ii. 111, 112.

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SWENDSEN, indicted capitally for forcibly carrying off an heiress and marrying her, the prisoner having asserted that, before he carried her off, she had squeezed his hand and kissed him, the Chief Justice asked "If she was consenting, why then did you force her to the tavern and marry her by a parson you had provided for that purpose?" The prisoner answered, "She married me with as much freedom as there could be in woman." But he was convicted and executed.¹

His supposed opinion as to the illegality of employing the military to put down civil disturbances.

Contrary to the doctrine which we hold, that soldiers are armed citizens, and may lawfully, like other citizens, by the command of a magistrate, and on an occasion of extremity even without the command of a magistrate, interpose to prevent the commission of a crime and to preserve or restore public tranquillity, Holt is said to have held that the military could only be lawfully employed against a foreign enemy or in quelling open rebellion. But this opinion of his is not to be found laid down on any trial, or recorded in any book of authority, and rests on the following gossiping story: "A party of the guards was ordered from Whitehall to put down a dangerous riot which had arisen in Holborn, from the practice of kidnapping, then carried to a great extent; and at the same time an officer was despatched to inform the Chief Justice of what was doing, and to desire that he would send some of his people to attend and countenance the soldiers. 'Suppose, sir,' said Holt, 'let me suppose the populace should not disperse on your appearance, or at your command?' 'Our orders are then to fire upon them.' 'Then mark, sir, what I say; if there should be a man killed in consequence of such orders, and you are tried before me for the murder, I will take care that you and every soldier in your party shall be hanged. Return to those who sent you, and

1. 14 St. Tr. 559-638.

tell them that no officer of mine shall accompany soldiers; the laws of this kingdom are not to be executed by the sword. This affair belongs to the civil power, and soldiers have nothing to do here.' Then, ordering his tipstaves and some constables to accompany him, he hastened to the scene of tumult, and the populace, on his assurance that justice should be done on the objects of their indignation, dispersed in a peaceable manner."¹ Holt certainly did, in his proper person, disperse a riotous assembly in Holborn, with the assistance of a band of constables, but the dialogue between him and the officer of the guards I consider apocryphal. From the earliest times till the beginning of the 18th century, the Chief Justice of the King's Bench had been in the habit of taking an active part in putting down disturbances.² In the Plantagenet reigns, when there were no standing armies or regular troops to be employed for this purpose, I find that he was not unfrequently sent into distant counties with a commission of array, and that he commanded in the field the forces so raised. Holt may very properly have expressed jealousy of the wanton interference of the military, but there is an extreme improbability that he should in such terms have condemned the employment, for the prevention of crime, of a portion of the *posse comitatus* wearing red coats instead of blue, and armed with muskets instead of batons.

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His dispersion of a riotous assembly with the aid of constables.

Holt continued, like preceding Chief Justices, to act out of court as a magistrate, in taking preliminary examinations against parties accused, and committing them for trial. Recognizances were likewise entered into before him. In the Journal of the second Earl

He acted out of court as a magistrate

1. Examiner, vol. iv. No. 14; Notes to Tatler, ed. 1806, vol. i. p. 147.

2. It is likewise a curious fact that the Judges of the King's Bench acted as police magistrates; taking preliminary examinations of witnesses, and committing criminals for trial.

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of Clarendon^t we find the following entry: "15th August, 1690. About six in the evening, my Lord Lucas went with me to my Lord Chief Justice Holt's. My brother came just from Tunbridge, and went with me; my wife stayed in the coach. My Lord Chief Justice presently took my recognizance to appear in the King's Bench the first day of the next term; and in the mean time to give my word and honor not to disturb the Government, and to keep the peace. I said I agreed to all, but to the last clause; which seemed a very odd one, and I could say nothing to it. At Lord Lucas's desire, I spoke to my Lord Chief Justice about Lord Forbes's bail; who could get none but gentlemen from Ireland. The Lord Chief Justice was very snappish."²

His trial at
bar with
the Crown.
Trin.

While Chief Justice, he had to fight a battle with the Crown, as well as with the Lords and with the

1. Henry Hyde, second Earl of Clarendon (*b.* 1633, *d.* 1709), was the son of Charles II.'s great minister. In 1685 he was appointed Lord Privy Seal. At the end of the year he was appointed Lord Lieutenant of Ireland. He found himself completely eclipsed in that country by the influence of Tyrconnel, and (as he was a sincere Protestant) his alarm was great when several Roman Catholics were sworn of the Privy Council. He, nevertheless, submitted to Tyrconnel's dictation, and when James threatened to dismiss him for his reluctant compliance in the reform of the army and administration, he wrote humble letters of apology. He was, however, dismissed in 1687, shortly after his brother, Rochester. He was invited to the consultation in aid of the Seven Bishops. When the Declaration of the Prince of Orange was published, he told the King that he had had no part in summoning him to England. He was much grieved at hearing that his son, Lord Cornbury, had deserted James; but at length joined the Prince of Orange at Salisbury. Finding that he was coldly received by William, he soon resumed his Tory principles, and endeavored to persuade the Princess Anne to insist on her rights to the throne. He took part in the Jacobite plots of 1690. Before setting out for Ireland William sent warning to him through his brother, Rochester. He was subsequently arrested by order of the Privy Council. He again engaged in Jacobite plots, and letters from him to James were seized among Preston's papers. He was confined in the Tower for six months, but afterwards suffered to go free. On the death of Queen Mary he lost his influence with the Princess Anne. The remainder of his life was spent in obscurity.—*Low and Pulling's Dict. of Eng. Hist.*

2. Vol. ii. pp. 328, 329.

Commons. The great sinecure office of Chief Clerk of the Court of King's Bench, now compensated by a pension of 9,000*l.* a year, falling vacant, Sir John Holt granted it to his brother Roland, and the question arose whether the patronage of it belonged to the Chief Justice or to the King? This came on to be decided by a trial at bar before the three Puisne Judges and a jury. A chair was placed on the floor of the Court for Lord Chief Justice Holt, on which he sat *uncovered* near his counsel. It was proved that the Chief Justices of the King's Bench had appointed to the office from the earliest times, till a patent was granted irregularly by Charles II. to his natural son the Duke of Grafton; and there was a verdict against the Crown, which was confirmed, on appeal, by the House of Lords.¹

Holt appears in the catalogue of our judicial authors, but does not add to its faint lustre. In the year 1708, he edited a collection of Crown cases from the MS. of Chief Justice Kelynge, adding three judgments of his own, all of which are upon the law of murder and manslaughter.² His notice of them in his preface rather shows that he was an instance of a great English lawyer being utterly unacquainted with English composition: "The three modern cases," says he, "are conceived to be of some use, therefore are thought fit to be published; and if they shall be found to be of any benefit, it's what is desired by the publisher thereof."

I am much grieved that we know so little of Holt in private life. He had no chronicler like Roger North, he has left no diary of his own, and there is not even a scrap of a letter of his extant. We must particularly regret that we have so few of his sayings

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Holt as an
author.

Holt in
private
life.

1. Shower's Parliamentary Cases, 111; Skinner, 354.

2. *Rex v. Lisle, Rex v. Plumer, Rex v. Mawgridge.*

CHAP. handed down to us, for, judging from his reprimand of
XXV. the "false prophet," they must have been very racy, if
sometimes a little irreverent.

He was
married to
a shrew.

He no doubt derived much satisfaction from the able discharge of his official duties, and the high credit which he thereby acquired; but he had no domestic bliss. His wife, Anne, the daughter of Sir John Copley, a lady of strict virtue, was a shrew, and they lived together on the worst possible terms. She fell into ill-health, and he was in high hopes of getting rid of her. To plague her husband, she insisted on consulting a physician with whom he had a personal quarrel, and who, for this reason, is said to have taken peculiar pains in curing her. She certainly survived him several years; and Dr. Arbuthnot,¹ afterwards writing to Swift an account of his attendance on Gay² the poet, said, "I took the same pleasure in saving him as Rad-

1. John Arbuthnot, a celebrated writer and physician, educated at Aberdeen, and, coming to London, supported himself by teaching mathematics. Accidentally administering relief to Prince George of Denmark at Epsom, he became physician to his Royal Highness, and in 1709 was appointed physician in ordinary to Queen Anne. He engaged with Pope and Swift in a scheme to write a satire on the abuse of human learning, under the title of "*Memoirs of Martinus Scriblerus*," but the death of the Queen put an end to the project and deprived the world of some ingenious performances. Born at Arbuthnot, near Montrose, Scotland, 1675; died in London, 1735.—*Bacon's Biog. Dict.*

2. John Gay, an English poet, who received his education under a Mr. Luck, a man of wit and a poet, in the town of Barnstable. He was afterwards apprenticed to a silk-mercator in London, but disliking the occupation in a few years, he bought the remainder of his time. His first poem, entitled "*Rural Sports*," appeared in 1711, was dedicated to Mr. Pope, and gained him the friendship of that poet, which lasted till death. In 1714 he became secretary to the Earl of Clarendon, and accompanied that nobleman on his embassy to Hanover. On the death of Queen Anne he returned to England. In 1727 appeared his "*Beggar's Opera*," which had a success considered by many infinitely beyond what it deserved both in a dramatic and moral point of view. It ran for sixty-three nights, and threw the author and his friends into ecstasies. Though it was a favorite with the town, however, it was not so at Court; and when he produced his sequel to it, under the title of "*Polly*," it was prohibited by the Lord Chamberlain. We owe to Gay the ballad opera. Born 1688, died 1732.—*Bacon's Biog. Dict.*



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cliffe¹ did in saving my Lord Chief Justice Holt's wife, whom he attended out of spite to her husband, who wished her dead." It is to be feared that although he thought he could define by law the privileges of the Lords and of the Commons, he was obliged to confess that his wife was the sole judge of her own privileges, and that when she pronounced him in *contempt* he was entirely without remedy. He established against the Crown his right to appoint the chief clerk of his court, but the nomination of footmen in his family, as well as of housemaids, rested entirely with his wife.² Nevertheless, he left her by his will a jointure of 700*l.* a year.

She brought him no children, and the whole of his great possessions went to his brother Roland, a descendant of whom is still Lord of Redgrave.³

I shall conclude this memoir in the words of the writer who first collected materials for the Life of Holt, and who thus gives him characteristic praise: "His Lordship was always remarkable in nobly asserting, and as vigorously supporting, the rights and liberties of the subject, to which he paid the greatest regard upon all occasions, and never suffered the least reflection tending to depreciate them to pass uncensured."⁴

1. John Radcliffe, a successful English physician, born at Wakefield, Yorkshire, in 1650, was educated at Oxford. He settled in London in 1684, and soon obtained a large practice, to which his talent for pleasantry and witticisms is said to have contributed. He became chief physician to the Princess Anne in 1686, after which date he was employed professionally by King William, whom he once offended by his rudeness or freedom of speech. He died in November, 1714. He bequeathed 40,000*l.* to build or found a library at Oxford which bears his name, and other large sums for charitable purposes.—*Thomas' Biog. Dict.*

2. Some maliciously accounted for his unwearied devotion to business by his dislike of the society of Lady Holt,—in the same manner as, in the time of Judge Gilbert, who wrote so many excellent law-books shut up in his chambers in Sergeants' Inn, it was said that the public was indebted for them to his *scolding wife*.

3. George St. Vincent Wilson, Esq., great-great-grandson of Roland.

4. Biographia Brit., "Sir John Holt."

CHAPTER XXVI.

CHIEF JUSTICES FROM LORD HOLT TILL THE APPOINTMENT OF SIR DUDLEY RYDER.

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A.D. 1710. Sir Thomas Parker, afterwards Earl of Macclesfield, Chief Justice, A.D. 1710—1718.

ON the death of Chief Justice Holt, Lord Godolphin, the Prime Minister, resolved to give his place to Sergeant Parker, who, as one of the managers for the House of Commons in the impeachment of Sacheverell, had greatly distinguished himself. The Attorney and Solicitor General, Sir James Montagu and Sir Robert Eyre, like all sensible men, disapproving of the prosecution, had been deficient in zeal when they assailed the libeller of VOLPONE; and neither of them had such political importance as to enable them to vindicate a claim to the promotion,—which would then have been peculiarly seasonable, as the Whigs had fallen into deep disgrace, and a change of administration was evidently at hand. The proposed appointment was very disagreeable to the Queen. Having attended Sacheverell's trial, she had been much shocked by the freedom with which Sergeant Parker had ridiculed the divine right of kings and other dogmas of the high-Church party, and still more by the acrimony with which he had inveighed against "the Doctor" himself, whom she loved in her heart for his principles, secular as well as religious, and above all for his personal abuse of those ministers with whom she was now so much disgusted. But being warned by Harley, who already, through the

His appointment disagreeable to the Queen.

agency of Mrs. Masham,¹ was her confidential adviser, that the time for a rupture with the Whigs was not yet quite arrived, she gave her reluctant consent.

Accordingly, on the 13th of March, 1710, SIR THOMAS PARKER² was installed as Chief Justice of the

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1. Abigail Masham (*d.* 1734), afterwards Lady Masham, was a favorite of Queen Anne. Her father was a London merchant who became a bankrupt; her mother was the aunt of Sarah Jennings, Duchess of Marlborough. Mrs. Hill entered the house of Lady Rivers, and afterwards that of Lady Marlborough, who obtained for her the post of Bedchamber Woman to the Queen. In 1707 she was privately married, in the Queen's presence, to Mr. Samuel Masham, one of Prince George's gentlemen. This roused the suspicions of the Duchess, who soon discovered that Mrs. Masham's cousin Harley, afterwards Lord Oxford, was using her as a means of furthering his interests with the Queen. It was thought to be owing to the influence of Harley and Mrs. Masham that Anne created two new bishops without consulting the minister Godolphin. In spite of her violence the Duchess found herself gradually supplanted by her former dependant. On the downfall of Godolphin's ministry (1710), Mrs. Masham introduced Harley, now virtually Prime Minister, to the Queen. She received the Privy Purse after her rival the Duchess had been dismissed, and her husband was raised to the peerage, apparently against the wish of Anne. Harley quarrelled with her, probably about some money he had promised her out of the Asiento Contract, and now relied on the rival favorite, the Duchess of Somerset. Lady Masham joined the Bolingbroke faction, although Swift attempted a reconciliation between the two ministers at her house. In fact there is some reason to believe that it was through her and Ormonde that the Jacobites at St. Germain's induced the Queen to dismiss Harley, and she had certainly reproached him for his uselessness shortly before that event took place (July, 1714). Of the remainder of her life nothing is known. From this time Lady Masham's name disappears from history. Her influence over Queen Anne is to be ascribed, first, to her political and Church principles, which were in almost exact accord with those of her mistress, and, secondly, to that "suppleness of temper" which formed so great a contrast to the violent character of the Duchess of Marlborough.—*Lew and Pulling's Dict. of Eng. Hist.*

2. Thomas Parker, Earl of Macclesfield, belonged to a branch of a respectable family long seated at Norton Lees in Derbyshire. His father, Thomas Parker, a younger son of George Parker, of Park Hall in Staffordshire, high sheriff of that county in the reign of Charles I., was an attorney practising in the neighboring town of Leek; and his mother was Anne, daughter and co-heir of Robert Venables, of Wincham in Derbyshire. He was born at Leek, July, 23 1666. After receiving the rudiments of his education at Newport in Shropshire, and at Derby, he was sent to Trinity College, Cambridge, on October 9, 1685, having already been admitted a student at the Inner Temple in February, 1683-4. It is not impossible, though very unlikely, that he might have

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Court of King's Bench, and continued to fill the office for the four remaining years of Queen Anne and the first four years of the succeeding reign. But tracing his eventful career is a bygone pleasure, for he afterwards held the Great Seal of England—till he was deprived of it on being convicted of judicial corruption. I must, therefore, refer those who would know the particulars of his extraordinary rise, and of his lamentable fall, to the "Life of Lord Chancellor Macclesfield," which I have already given to the world.¹

His life
already
written.

However, I cannot refrain from expressing my regret that some connections of his family, ashamed of his having been the son of a village lawyer,—of his having been at Newport school, along with Tom

been articled to his father at the time he became a member of the Inner Temple. The town of Derby returned him as one of its representatives in 1705, and again in the two following parliaments; but though he sat as a member for the five years he continued at the bar, there is no record of any speech he delivered in the House, nor of any part he took, except in the proceedings against Dr. Sacheverell. In June, 1705, he was not only raised to the degree of the coil, but immediately made one of the Queen's Sergeants and knighted. Attached to the Whig party, he was naturally appointed one of the managers in the unpopular impeachment of Dr. Sacheverell in 1710, when his speeches were so effective, and his denunciations against the vain and factious doctor were so strong, that in his return to his chambers he with difficulty escaped from the mob, which since the commencement of the trial had been furiously excited against the prosecution. His exertions were soon rewarded and his fright quickly compensated by the appointment of Chief Justice of the Queen's Bench on March 13. Two years after the accession of George I., on March 10, 1716, he was raised to the peerage by the title of Baron Parker of Macclesfield, and at the same time he received the grant of a pension for life of 1,200*l.* a year. This is a sufficient proof of the estimation with which he was regarded by the King, whose favor was two years after firmly established by the opinion which the Chief Justice gave, that his Majesty had the sole control over the education and marriages of his grandchildren (*State Trials*, xv. 1222); an opinion which, though subsequently confirmed, insured the enmity of the Prince of Wales. The fruits of the King's favor were immediate; the effect of the Prince's animosity was for some time concealed. The Great Seal was presented to Lord Parker on May 12, 1718, with the title of Lord Chancellor, accompanied by the extraordinary present of 14,000*l.* from the King. He died on April 28, 1732, and was buried at Sherburn.—*Foss's Lives of the Judges*.

1. *Lives of the Chancellors*, vol. iv. ch. cxxi.

Withers the shoemaker,—of his having himself practised as an attorney, and of his having raised himself by his gigantic vigor of intellect, would fain represent him as having enjoyed all the advantages of high birth and regular education,—as having been destined to the bar from his childhood, and as having reached his high honors in the usual routine of professional progress. In overlooking well-established facts respecting him, they surely lessen the merit which belongs to him while he was ascending to eminence,—and they deprive him of the mitigation of early penury for the disreputable practices into which he was led by his excessive love of riches. If I were to re-write his life, I must substantially adhere to my former narrative,—which if he could peruse he would not repudiate; for he never pretended to an aristocratical origin, and he was delighted, when Chief Justice of England, to spend an evening with an old schoolfellow who had thrown aside a leathern apron, and whose hands were hard with rosin.¹

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When Parker had gained the favor of George I., and, by intrigues with the Hanoverians who accompanied that sovereign to England, had subverted the influence of Lord Cowper,² another Chief Justice of

April, 1718.
Vacancy in
the office
of Chief
Justice of
the King's
Bench on
his promo-
tion to be
Chan-
cellor.

1. In a new edition of my *Lives of the Chancellors* I have pointed out his pedigree from the Parkers of Park Hall, and I have shown that he certainly had been entered of Trinity College, Cambridge; but the evidence is strengthened as to the low condition of his father, and the obstacles he had to surmount in the early part of his career.

2. William Cowper was born at Hertford Castle about four or five years after the Restoration. He was some years at a school at St. Albans, and became a student at the Middle Temple on March 8, 1681-2. He was called to the bar on May 25, 1688. Bred up in the principles of political liberty and with a deep hatred of Popery, his youthful ardor prompted him a few months later to offer his personal aid in resisting the obtuse tyranny of James II. He and his brother Spencer, with a band of men, joined the Prince of Orange in his march to London; but on the peaceful establishment of William and Mary on the throne, he returned to the stage of his profession, on which, whether on the Home Circuit or in the courts of Westminster, he soon became a favorite performer.

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the King's Bench was to be provided. The new Chancellor was determined that he would not commit the blunder of raising up to high office a formidable rival, by whom he might in turn be superseded. He therefore fixed upon a dull lawyer, of decent character, to whom nothing positive could be objected, and who,—unfit to be placed in the House of Lords,—without aspiring to the “marble chair,” must ever remain his humble supporter.

I am afraid that the taste of my readers may be a little corrupted by the exciting atrocities of the Chief

When the Tory ascendancy began to be diminished, the removal of Lord Keeper Wright, the weakest and most inefficient man of the party, was determined on, and Cowper, at the urgent solicitation of the Duchess of Marlborough, was selected from the Whig ranks to hold the Seal. It was delivered to him as Lord Keeper on October 11, 1705. The commencement of his judicial career was illustrated by a noble reform. It had been a custom of long standing for the officers of the court and the members of the bar to present new-year's gifts to the Chancellor or Keeper,—a practice which, if not actual bribery, he considered looked very like it. These he at once refused to receive; and the extent of the sacrifice may be estimated, if not by his wife's calculation that they amounted to nearly 3,000*l.*, by Burnet's more probable computation of 1,500*l.* The Queen invested him, on May 4, 1707, with the title of Lord High Chancellor of Great Britain; and from that time the designation of Lord Keeper fell into desuetude, only one other possessor of the Great Seal having been so distinguished up to the present day. Of Lord Cowper's character as a statesman there will always be two opinions. The course of his conduct that would excite Burnet's or Wharton's applause would certainly be decried by Swift and the Tory writers. But all would allow that he was a firm adherent to the principles he professed, and that those principles tended to civil and religious liberty, and that the motives which guided him were pure and straightforward, though occasionally tainted with a little too much of party prejudice. Of his extraordinary oratorical powers, of the singular gracefulness of his elocution, of the sweetness of his disposition, and of his integrity and impartiality as a judge there has never been any question. Of his urbanity and consideration for the feelings of others we have a striking instance in his repressing the harsh personal remarks made by a counsel against Richard Cromwell, in a cause to which he was a party, by immediately addressing the old Protector, and kindly begging him to take a seat beside him on the bench. He died after a few days' illness on October 10, 1723. His wife followed him four months afterwards, literally dying of a broken heart.—*Foss's Lives of the Judges.*

Justices of the seventeenth century, and that some dis-
may may be felt upon the introduction of a man who
is unredeemed from insipidity by the commission of a
single great crime. I own that such company is tire-
some, and we shall speedily take leave of him. But I
must present a little sketch of this worthy person, who
for seven years was Chief Justice of England.

SIR JOHN PRATT'S great distinction is, that he was
the father of LORD CAMDEN.¹ He was descended,
however, from a respectable family long settled at
Careswell Priory, near Collumpton, in the county of
Devon. He studied at Oxford, and was elected a
Fellow of Wadham College. Although an eldest son,
it was necessary that he should work for his bread, as
the estate which had remained many generations in
his name had been alienated by his spendthrift grand-
father. He was, therefore, called to the bar in the end
of the reign of Charles II., and, by plodding diligence,
got into respectable business. In the year 1700 he took
the degree of Sergeant-at-law, and he was twice re-
turned to the House of Commons as member for Mid-
hurst. But he had no talents for public speaking, and
in the Parliamentary Debates his name is not once
mentioned. He was a good Whig under the patron-
age of Lord Cowper, who, while disposed to promote
him, found him quite unfit for the situation of Attorney
or Solicitor General. His practice in the Court of
Common Pleas, however, was considerable, for he was
well versed in his profession; and, although reckoned
heavy elsewhere, he there went by the name of the
"lively Sergeant."

Having remained true to his party during the four
years of Tory rule,—on the accession of George I.,
the desire to do something for his advancement was
strengthened. Lord Cowper, being restored to the

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Sir John
Pratt,
Chief Jus-
tice.

His origin
and prog-
ress at the
bar.

A.D. 1700.

He is
twice
member of
the House
of Com-
mons.

A.D. 1714.

1. See Lives of the Lord Chancellors.

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office of Chancellor, in his letter to George I. respecting the state of the bench in Westminster Hall, objected to the continuance of the two brothers Sir Littleton Powys¹ and Sir Thomas Powys² as Judges

1. Littleton Powys was born about 1648, and was instructed in the mysteries of law at Lincoln's Inn, where he was called to the bar in May, 1671. At the Revolution he took arms in favor of William with three servants, and read aloud that Prince's declaration at Shrewsbury. He was rewarded for his zeal by being made in May, 1689, second judge on the Chester Circuit. In 1692 he was raised to the degree of the coif, and soon after knighted; and on Oct. 29, 1695, he was promoted to the Bench as a Baron of the Exchequer. In that court, and afterwards in the King's Bench, to which he was removed on Jan. 29, 1701, he sat during three reigns till Oct. 26, 1726, when, being then seventy-eight years old, he was allowed to retire on a pension of 1,500*l*. He was a good plodding judge, though, according to Duke Wharton's satire, he could not "sum a cause without a blunder," and was somewhat too much inclined to take a political view in the trials before him. With moderate intellectual powers, he filled his office with average credit, but was commonly laughed at by the bar for commencing his judgments with "I humbly conceive," and enforcing his arguments with "Look, do you see."—*Foss's Lives of the Judges*.

2. Thomas Powys was the brother of Sir Littleton, and only a year his junior. He filled a larger space in the history of his time, though he occupied a judicial position for the brief period of a year and a quarter. After being educated at Shrewsbury School, he became a student at Lincoln's Inn, and was called to the bar in 1673. Burnet calls him a young aspiring lawyer; and he certainly outstripped his elder brother in the race for legal honors, though neither of them had any eminence in legal attainments. When James II. found that his law officers declined to comply with his arbitrary requirements, he selected Thomas Powys on April 23, 1686, to fill the post of Solicitor General, and thereupon knighted him. Offering no objection to the issue of warrants to avowed Papists to hold office, and arguing Sir Edward Hales's case in favor of the power assumed by the King to dispense with the test, he was advanced in December, 1687, to the Attorney-generalship. In that character he conducted the case against the Seven Bishops in June, 1688, when the moderation if not lukewarmness of his advocacy contrasted strongly with the indecent intemperance of Williams, the Solicitor General. It may readily be believed, as he expressed himself in a letter to the Archbishop of Canterbury in the following January, excusing his acting in that "most unhappy persecution," that "it was the most uneasy thing to him that ever in his life he was concerned in." The abdication of James of course brought his official career to a close; and during William's reign, though he was a fair lawyer and fully employed, especially in the defences on state prosecutions, he remained on the proscribed list. From 1701 till 1713 he represented Ludlow; and at the beginning of Queen Anne's reign he was made at one step Sergeant and Queen's Sergeant; and before the end of it, on



GEORGE, PRINCE OF DENMARK.

AFTER SIR GODFREY KNELLER.



of the King's Bench, particularly Sir Thomas, whom he denounces as "zealously instrumental in the measures which ruined James II., and as still devoted to the Pretender;" and added, "If either of these be removed, I humbly recommend Sergeant Pratt, whom the Chief Justice Parker, and I believe every one that knows him, will approve." Accordingly Sir Thomas Powys was superseded, and Sergeant Pratt, being knighted, was made a Puisne Judge of the King's Bench in his stead.

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He is made
a Puisne
Judge.

He sat four years there as a colleague of Parker, who, having during this time had full proof of his docility, inoffensiveness, and moderate sufficiency for the duties of the office, when about to become Lord Chancellor resolved to appoint him his successor. As a step to this distinction, in the short interval between the resignation of the Great Seal by Lord Cowper and the delivery of it to Lord Macclesfield, it was put into commission, and Pratt was made a Lord Commissioner.

A.D. 1714—
1718.

He took his seat as Lord Chief Justice of the King's Bench on the 15th of May, 1718.

Chief Jus-
tice of the
King's
Bench,
May 15,
1718.

His panegyrists (for a Chief Justice is sure to have panegyrists) lauded him—not as a great real-property lawyer, or a great commercial lawyer, or a great crown lawyer, but as "A GREAT SESSIONS LAWYER;" and in looking through *Strange's Reports*, *Lord Raymond's Reports*, *Burrow's Reports*, and *Modern Reports*, in which his decisions are recorded, it is curious to observe how many of them turn upon questions of

June 8, 1713, was promoted to a seat in the Queen's Bench, where his brother was then second judge. He did not long remain there, for, the Queen dying in August, 1714, King George on his coming to England superseded him on October 14. He survived his dismissal nearly five years, and dying on April 4, 1719, was buried under a splendid monument at Lilford in Northamptonshire, the manor of which he had purchased.—*Foss's Lives of the Judges*.

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His most
celebrated
judgment,
A.D. 1718.

poor-rates and parochial settlement—then a new field of litigation. One, and one only, of these judgments is still interesting, from having been married to immortal verse.

The widow of a foreigner, being left destitute on the death of her husband, who had no parochial settlement in England, was removed from a parish in London to the parish in the country in which she was born; but this parish appealed to the quarter sessions against the order of removal, on the ground that a maiden settlement is for ever lost by marriage. The justices at sessions, being much puzzled, referred the case to the Court of King's Bench, and the decision there is thus recorded by Sir James Burrow¹ in his Reports:

"A woman having a settlement
Married a man with none;
The question was, he being dead,
If what she had was gone.

"Quoth SIR JOHN PRATT, the settlement
Suspended did remain,
Living the husband; but him dead,
It doth revive again.

(*Chorus of Puisne Judges.*)

"Living the husband; but him dead,
It doth revive again."²

His doctrine of
suspension
over-
turned.

This decision seems to have created a great sensation in Westminster Hall; but the glory which it conferred on Chief Justice Pratt soon passed away, for, as far as the *suspension* was concerned "living the hus-

1. Sir James Burrow (1701-1782), legal reporter. At the early age of twenty-three he obtained the post of Master of the Crown Office, and retained it until his death. Burrow's merits as a law reporter have been universally acknowledged. His collection of "Reports of Cases argued and determined in the Court of King's Bench during the time of Lord Mansfield's presiding" was published in 1756-72, the fourth edition appearing in five volumes in 1790. The first volume of his "Reports of Cases adjudged in the Court of King's Bench since the death of Lord Raymond" came out in 1766, and the last—there were five in all—was issued in 1780.—*Stephen's Dict. of Nat. Biog.*

2. Burr. Sett. Cas. 124; Burr's Just., tit. "Settlement."

band," it was reversed by his successor, Chief Justice Ryder, who determined, with *his* Puisnics, that the maiden settlement continues after the marriage till a new settlement is gained; and that although the wife cannot be separated from the husband by an order of removal, if he, having no settlement, has deserted her, she may be sent to her parish for relief, even in his lifetime :

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" A woman having a settlement,
Married a man with none :
He flies and leaves her destitute ;
What then is to be done ?

" Quoth RYDER, the Chief Justice,
' In spite of SIR JOHN PRATT,
You'll send her to the parish
In which she was a brat,

" ' *Suspension of a settlement*
Is not to be maintained ;
That which she had by birth subsists
Until another's gained.'

(*Chorus of Puisse Judges.*)

" That which she had by birth subsists
Until another's gained." ¹

Chief Justice Pratt acquired considerable credit by his firm conduct in the famous controversy between Dr. Bentley² and the University of Cambridge. When,

A. D. 1722.
Chief Justice Pratt's
conduct in
Dr. Bentley's
Case.

1. *St. John's, Wapping*, v. *St. Botolph's, Bishopgate*, Burr. S. C. 367 ;
2 Bott. 109.

2. Richard Bentley, D.D., an eminent critic and divine, was the son of a mechanic at Wakefield, Yorkshire, where he was born Jan. 27, 1661-2. He was educated at the grammar-school of his native town, and at St. John's College, Cambridge. The first specimen of his literary acquirements was his Boyle's Lectures, in which he displayed great powers of mind, supported by the profound philosophy of Newton, and the clear reasoning of Locke, on the being and power of a God. For this he was made librarian at St. James's, and while holding this situation became involved in a quarrel, which gave rise to a celebrated controversy. The Hon. Mr. Boyle had obtained the use of a MS. from the library to complete the edition of the " Epistles of Phalaris," which he was about to publish, and when Bentley demanded the book sooner than was expected, the request was regarded as an affront, and a war of words arose, which drew forth on both sides the most brilliant and spirited exhibition of wit, criticism, and erudition. In 1700 Bentley was made Master of Trinity College,

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XXVI.
Dr. Bentley's Case,
continued.

on the application of this very learned and very litigious scholar, the Court of King's Bench had granted an attachment against his enemy, Dr. Colbatch,¹ the author of *Jus Academicum*, for a contempt of their jurisdiction. Sir Robert Walpole and Lord Macclesfield attempted to exercise their influence in his favor. "But," says Bishop Monk, "the patronage of these great ministers was not calculated to render the unfortunate divine any real service. The distinguished Judge who presided on the bench entertained a high notion of the dignity of his court, and the necessity of repressing all attempts to disparage or question its authority. He had, also, too just an opinion of the

Cambridge, to which were added the archdeaconry of Ely, a benefice in the isle, and the office of chaplain to the King. In the government of his college Bentley was arbitrary, and the Fellows complained to the visitor, the Bishop of Ely, and charged him with embezzling the money of the college, an accusation which created the most violent contentions, and which at last, after twenty years' continuance, established the innocence of the Master. As Divinity Professor he also exposed himself to the obloquy of the University; he refused to admit, without the fee of four guineas, several persons to the degree of Doctor, for which measure he was suspended and degraded by the University. An appeal was made to the King, and the matter was referred to the judges of the King's Bench, who reversed the proceedings, and directed his honorable restoration. During these struggles Bentley preserved his unshaken firmness of mind, and his time was devoted to laborious criticism. His editions of Terence, Homer, Phædrus, Milton's "Paradise Lost," etc., evince the great powers of his mind, and the most extensive acquaintance with classical literature. After nearly ten years of gradual decay, this great scholar died in his college July 14, 1742.—*Cooper's Biog. Dict.*

1. John Colbatch, D.D., received his education at Westminster School and Trinity College, Cambridge. On taking orders he was appointed chaplain to the British factory at Lisbon, and held that appointment for about seven years. During his stay there he published an Account of the State of Religion and Literature in Portugal, which work was written at the request of Bishop Burnet, to whose son, Gilbert, he subsequently became tutor. Colbatch was also tutor to the son of the Duke of Somerset. At the age of forty he returned to Trinity College, having only received a stall at Salisbury as the fruit of all the promises of patronage made to him. In 1707 he was appointed Casuistical Professor of Divinity. The tranquillity of the latter part of his life was greatly disturbed by a long lawsuit which he brought against Dr. Bentley, the Master of Trinity. Died Feb. 11, 1748.—*Cooper's Biog. Dict.*

sanctity of the judicial character not to be jealous of the interference of persons in power with the administration of justice. He heard, therefore, the representations of the Cabinet Ministers without the least disposition to attend to them; insomuch that the Premier accounted for his inflexibility by observing that 'Pratt had got to the top of his preferment, and was therefore refractory and not to be governed by them.' According to our notions, we should rather blame the Chief Justice for suffering interviews with a party in a pending proceeding, for we read with surprise this mitigation of his supposed sternness. However, when Dr. Colbatch, by advice of the Lord Chancellor, waited on the Chief Justice at his house in Ormond Street, he behaved to him with considerable candor and mildness; he declared, indeed, that he viewed the offence in a serious light, but assured him that he would take no advantage of his having privately acknowledged himself author of the book."—The writer of *Jus Academicum*, for having said, in allusion to the Court of King's Bench granting writs of *mandamus* and *prohibition* against the University of Cambridge, "that they who intend to subvert the laws and liberties of any nation commonly begin with the privileges and immunities of the Universities," was sentenced by Chief Justice Pratt to be imprisoned, fined 50*l.*, and bound over to his good behavior for a twelvemonth.¹

Then followed Bentley's application for a *mandamus* to the University of Cambridge to restore him to his academical degrees, of which he had been deprived without having been duly summoned or heard. After the case had been argued several successive terms, at prodigious length, Chief Justice Pratt said,—

"This is a case of great consequence, not only to the gen-

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XXVI.
Dr. Bentley's Case,
continued.

1. Monk's Life of Bentley, vol. ii. ch. xvi. p. 185.

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Dr. Bentley's Case,
continued.

tleman who is deprived, but likewise as it will affect all the members of the University. It is the glory and happiness of our excellent constitution, that, to prevent any injustice, no man is to be concluded by the first judgment; but that, if he apprehends himself to be aggrieved, he has another court to which he can resort for relief; with this view, the law furnishes him with appeals and with writs of error; and in this particular case, lest the party complaining should be remediless, it has become absolutely necessary for this Court to order the University to lay before us the state of their proceedings against him, so that if they have erred he may have right done to him, or if they have acted according to the rules of law, their acts may be confirmed. The University ought not to consider it any diminution of their honor, that their proceedings are examinable in a superior court. For my own part I am sure it is a consideration of great comfort to me, that, if I do err, my judgment is not conclusive, and my mistake may be rectified. As to Dr. Bentley's behavior when served with process out of the Vice-Chancellor's Court, I must say that it was very indecent, and I can tell, if he had said as much of our process, we should have laid him by the heels for it. But however reprehensible it might be for him to say of the Vice-Chancellor, *stultè egit*, such words will not justify a suspension or deprivation of academical degrees. Be these matters how they will, surely he could not be deprived without notice. Our law adopts the first rule of natural justice, that no man shall be condemned till he has been heard or had an opportunity of being heard in his defence. The Vice-Chancellor's authority ought to be supported for the sake of keeping peace within the University, but then he must act according to law, which I do not think he has done in this instance."

The Puisnies concurred, one of them citing a precedent of high authority—*Adam and Eve's case* before God himself. *Fortescue, J.*: "Even God himself did not pass sentence upon *Adam* before he was called upon to make his defence. 'Adam (says God), where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to *Eve* also."—A peremptory *mandamus* was granted.¹

1. 1 Strange, 557; 2 Lord Raymond, 1334.

There was only one state trial before Chief Justice Pratt, that of Christopher Layer, prosecuted for having conspired to bring in the Pretender by means of a French invasion. On this occasion there was exhibited from the bench a harshness which reminds us much more of ante-Revolution judges than of the mild demeanor of Holt. The prisoner, a gentleman of birth and education, having been brought to the bar at his arraignment loaded with irons, said,—

“My Lord, I hope I shall have these chains taken off, that I may have the free use of that reason and understanding which God hath given me. They have brought upon me the strangury to a degree that is very painful; and if I am told truly that your Lordship is afflicted with that distemper, you will pity me. I hope that these chains shall be taken off in the first place, and then I hope that I shall have a fair trial.” *Pratt, C. J.*: “As to the chains you complain of, it must be left to those to whom the custody of you is committed by law, to take care that you may not make your escape; when you come to your trial, then your chains may be taken off.” *Sir Robert Raymond, A. G.*: “I am sure nothing is intended but that he should have a fair trial; but to complain here of chains, carries with it a reflection of cruelty, and we know what effect these things may have abroad. The prisoner hath been kept as all persons in his circumstances are when they have been attempting to make an escape.” *Pratt, C. J.*: “Alas! If there hath been an attempt to escape, there can be no pretence to complain of hardship; he that hath attempted an escape once, ought to be secured in such manner as to prevent his escaping a second time.” *Sir Philip Yorke, S. G.*: “It is well known that when this gentleman was in the custody of a messenger, he not only made an attempt to escape, but actually escaped out of a window, two pair of stairs high. It does not become the candor of a person in the prisoner’s circumstances to aggravate and make such misrepresentation of the usage he had received.” *Gentleman Jailer of the Tower of London*: “My Lord, he never has attempted to escape since he was in my custody.” *Mr. Hungerford, counsel for the prisoner*: “My Lord, I beg to be indulged a few words that he is in chains now is demonstrable, and he hath told me they are so grievous that he cannot sleep but in one posture—

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Pratt tries
Layer for
high trea-
son.

CHAP.
XXVI.
Laver's
trial, con-
tinued.

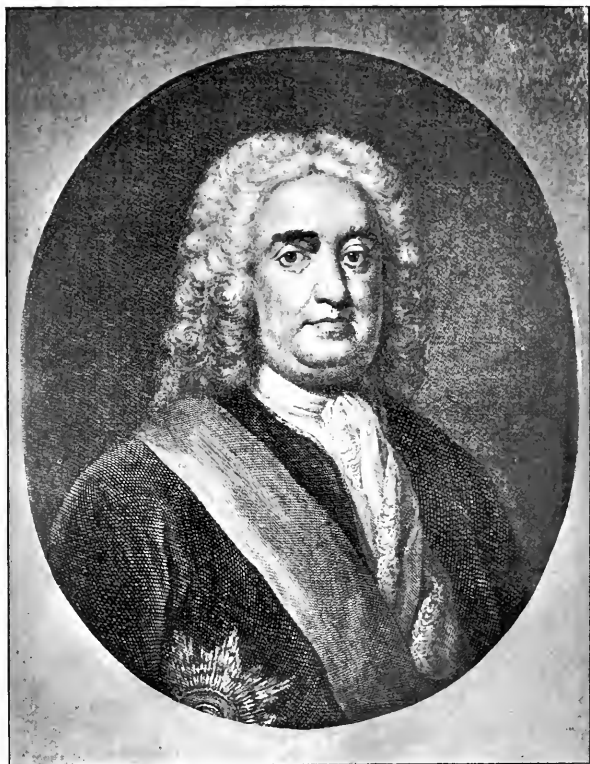
on his back. Your Lordship may observe that the Gentleman Jailer, who seems to execute his authority with all humanity, now helps to hold up his chains, otherwise he could not stand. I believe I might challenge them to give an instance where any prisoner was shackled with irons in the Tower before Mr. Laver. His Majesty's prisoners in the Tower are such strangers to this usage, that the very materials were wanting there; these fetters were sent for from Newgate, and I hope they will be sent back thither. Your Lordship hath hinted it as an indulgence intended to him when he comes to his trial, that his irons shall be taken off; but I humbly insist upon it, that by law he ought not to be called upon even to plead, till he may exercise his mental faculties free from bodily torture." *Pratt, C. J.*: "This is nothing but to captivate the people. What signifies his chains being taken off this minute, and afterwards put on again the next?" *Mr. Hungerford*: "We might humbly apprehend and hope, my Lord, that the better to prepare himself for his trial, he may continue without his chains till after that time." *Pratt, C. J.*: "I am of another opinion; and if we should order his chains to be taken off, and he run away, I do not know but we are guilty of his escape. He shall have a fair and a just trial, but to make objections in matters of this nature is to cast a reflection on the Court for not doing that which is not in their power to do."

The prisoner was undoubtedly *guilty*, but the harsh manner in which his trial was conducted throughout excited a strong sympathy in his favor; he was regarded as a martyr; and his head being stuck upon Temple Bar, it was carried off, and long preserved as a relic.¹

A. D. 1723—
1725.
Pratt's
opinion
respecting
the power
of the King
in the mar-
riages and
education
of the royal
family.

I am not aware of Pratt coming upon the political stage on any other occasion, except when he was consulted with the other Judges upon the questions which arose out of the disputes between George I. and the Prince of Wales (afterwards George II.) respecting the power of the reigning King, by his prerogative, to regulate the education and marriages of his grandchildren. He spoke immediately after Baron Mon-

1. 16 St. Tr. 94-324.



ROBERT HARLEY, EARL OF OXFORD.

tagu, who had no better reasons to give in favor of the King than the discipline among the patriarchs, who educated and governed all their grandchildren and great-grandchildren, and that the King is called "*parens patriæ et custos regni et pater-familias totius regni.*"¹ Pratt tried to fortify himself by modern precedents:

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"The regulation of marriages in the royal family," said he, "is an undoubted prerogative of the Crown, proved by all the arguments the nature of the thing is capable of, constantly claimed, enjoyed, and submitted to, the contrary being ever taken to be a great offence and sometimes thought high treason. The Countess of Shrewsbury's case, 12 Rep. 94, is very strong. The Duke of Suffolk's attempt was held high treason, proving that, at all events, it is an offence of magnitude. The case of the Princess of Orange in Charles II.'s time is very material. The King made the match, and the Duke of York her father was against it. The Princess of Modena wished to prevent it; but the King's answer was, 'it is by my consent, and none may gainsay it.' Here is the claim of prerogative against the opinion and wishes of the father. Now as to the education of the children and grandchildren of the royal family, that is a natural and necessary consequence,—if the Crown has the marriage of the royal family, it hath the care of their education. If not educated well, they cannot be married well. The King having the end, should have the means; he must take care of their persons that they may not be disposed of to the prejudice of the nation. This prerogative never was disputed by any of the royal family, and many have been prosecuted for the breach of it. Not a few of the distractions and confusions which attended the differences between the Houses of York and Lancaster arose from the marriages and education of the children of the blood royal not being regulated by the sovereign on the throne."²

He fortifies
himself by
modern
precedents.

When Lord Macclesfield, on his impeachment for corruption, was deprived of the Great Seal, there was a general expectation that it would have been trans-

Expecta-
tion that
he would
receive the
Great Seal.

1. "The father of his country, the guardian of the realm, and the head of the whole kingdom."

2. 15 St. Tr. 1216.

CHAP.
XXVI.His death.
Feb. 24,
1725.

ferred to the Chief Justice of the King's Bench, who, without being an intriguer, like his predecessor, was well esteemed both by the King and the Prime Minister, and probably would have been preferred by them to Sir Peter King,¹ the Chief Justice of the Common Pleas; but, while the impeachment was pending, Sir John Pratt was struck with a mortal disorder, of which he died at his house in Ormond Street, on Wednesday, the 24th of February, 1725.

If he was not very eminent for his talents or public services, it should be known to his credit that no graver charge was ever brought against him than that, "being the proprietor of Begeham Priory, in Kent, he dismantled the church, the roof of which was still standing, and laid out the site of it in a pleasure-garden, with flowers and gravel walks."²

His
descend-
ants.

Having had an immense number of children by two wives, and having been careless about his pecuniary affairs, he left his family nearly destitute; but if

1. Peter King (Lord King), Chancellor of England, and famous for his ecclesiastical learning as well as for his knowledge in the law, was born in 1669 at Exeter. His father was a grocer, and determined to bring up his son to the same trade. But Peter's talents and application attracted the attention of his maternal uncle, the celebrated John Locke, through whose influence he was sent to the University of Leyden. After his return to England he studied law, gained admission to the bar, and rapidly rose in his profession. About 1700 he was elected a member of Parliament for Beer-Alston, which seat he retained for several years. In 1708 he was appointed Recorder of London, and was knighted. Notwithstanding the arduous duties of his profession, Sir Peter found time to write two able theological works, which alone would have made him celebrated. They are an "Inquiry into the Constitution, Discipline, Unity, and Worship of the Primitive Church" (1691), in which he favored the rights of the Protestant Dissenters, and the "History of the Apostles' Creed, with Critical Observations on its Several Articles" (1702). Upon the accession of George I. he was appointed Lord Chief Justice of the Court of Common Pleas, and soon after sworn of the Privy Council. He was created a peer May 25, 1725, and when the Great Seal was taken from Lord Macclesfield it was delivered to him the 1st of June following. He resigned the seals in 1733, on account of ill-health, and died in 1734.—*Rose's Biog. Dict.*

2. Hasted's Kent, ii. p. 380.

he had been favored with a glimpse into futurity he might have seen a son of his Lord High Chancellor, and his grandson and great-grandson marquesses and knights of the Garter.

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Sir John Pratt was succeeded in the office of Chief Justice of the King's Bench by a man very distinguished in his day, who was himself raised to the peerage, and was looked upon as the founder of a patrician house, but whose line soon became extinct, and who is now little known beyond the precincts of Westminster Hall.

Lord
Raymond,
Chief Jus-
tice.

Although LORD RAYMOND was said to be descended from the Crusader of his name celebrated by Tasso,¹ his branch of the family had fallen into great decay, and his grandfather was a trader in the City of London. His father, however, studied the law, had considerable success at the bar, and in the reign of Charles II., by the combination of extraordinary learning and extraordinary servility, was made a Puisne Judge, first of the Common Pleas, and then of the King's Bench. This unprincipled Judge showed peculiar zeal in the famous *QUO WARRANTO* prosecution for subverting the liberties of the City of London. Chief Justice

Son of Sir
Thomas
Raymond.

1. Torquato Tasso, one of the most celebrated and most unfortunate among all men of genius, was the son of Bernardo Tasso, himself noted in the roll of Italian poets. He was born in 1544, at Sorrento, on the southern shore of the Bay of Naples. Tasso studied at Padua, and published "*Rinaldo*," a romantic poem, at the age of eighteen. In 1575 the "*Gerusalemme Liberata*," one of the few great epics the world has seen, was completed. But its illustrious author had not the courage to publish it. Obscure stories are told of unfortunate love; what we know is, that the poet was already in a state of incipient derangement. He was soon placed in confinement, and remained imprisoned for seven years. The "*Jerusalem*" was printed repeatedly in 1581, in spite of his angry prohibitions. He was released in 1586, and invited to come to Rome from Naples, to be crowned a poet as Petrarch had been. Just before the time fixed for his coronation, he felt his end approaching, and retiring to the convent Sant' Onofrio, on a hill overlooking the Eternal City, he breathed his last calmly in the spring of 1585.—*Appl. Encyc. of Biog.*

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XXVI.

A.D. 1683.

Saunders being then at death's door, Sir Thomas Raymond loudly declared that "the Court was unanimously in favor of the Crown on all the points which had been discussed;" and he might probably have succeeded in his object if he had not been rivalled by Jeffreys, whose splendor of infamy dimmed every lesser noxious light which might otherwise have attracted the execrations of mankind. The aspiring Puisne himself died (some said from vexation at his disappointment) while still a young man. If he had survived, he no doubt would have been tried in the capacity of Chief Justice by James II.; and, if there had been no limit to his servility, he might have continued to preside till the King's power to dispense with all statutes, and to enforce martial law in time of peace, after being established by judicial decision, was upset by physical force. He left behind him a high reputation as a lawyer, although a very bad one as a politician; and a volume of Reports compiled by him proves that he was a complete master of all the wiles of his profession.¹

At his death, his only son Robert, the subject of this little memoir, was only ten years old, and so escaped the contamination of his training. The lad naturally called himself a Tory, and he continued inclined to high prerogative notions till he saw reason to change his side; but through life he maintained a fair character for honor and independence.

I find no more authentic account of his education than the inscription on his tomb, which represents him as having been early imbued with a love of classical learning, and as having devoted himself with extraordinary assiduity and success to a scientific study of jurisprudence.

1. He died while on the circuit in the spring of 1683, in the 50th year of his age.

He was called to the bar in the year 1694, being then an accomplished lawyer, and he soon got into extensive practice.

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He is called
to the bar,
A.D. 1694.

His professional prosperity he himself ascribed to his habit of reporting. He was determined to rival, and he greatly excelled, the fame of his father in this line. Not only when he was a student, but when called to the bar, when Attorney General, and when Chief Justice, he wrote an account of all the most remarkable decisions in the Court of King's Bench, giving the arguments of counsel and the opinions of the judges with admirable point, vigor, and exactness.¹

His emi-
nence as a
reporter.

The first considerable case in which he appeared as counsel was the prosecution, before Lord Holt, of Hathaway the impostor, who pretended that, being bewitched, and having fasted forty days, he vomited pins, and who, under pretence of disenchanting himself, had assaulted and drawn blood from the supposed witch. Mr. Raymond was mainly instrumental in obtaining the conviction of this miscreant, which opened the eyes of the public to the frauds and follies of witchcraft, although, during the seventeenth century, they had strangely grown with advancing knowledge, to the unspeakable disgrace of legislation and of the administration of criminal justice in England.²

A.D. 1702.
Witchcraft
put an end
to by the
prosecu-
tion of an
impostor.

1. His published Reports extend from Easter, 6 Will. and Mary, to Trinity, 5 and 6 Geo. II.

2. The severest statutes against witchcraft were passed after Lord Bacon had published the most valuable of his immortal works, and they were blindly acted upon in the age of Milton and Dryden. Mr. Raymond had drawn the indictment against Hathaway. A specimen of his legal Latinity taken from it may amuse the reader: "Quod quidem Richardus Hathaway nuper, etc., laborer, existens persona malor' nomenis et famæ et impostor, et machinans et malitiose intendens quandam Saram Morduck ux' cujusdam Edwardi Murdock, Waterman, foeminam per totum vitæ suæ tempus existen' honestam et piam, et non Sagam (Anglice, a witch), nec Magiam (Anglice, witchcraft), Incantamentum (Anglice, enchantment), Fascinationem (Anglice, sorcery), unquam exercen', in periculo vitæ suæ amissionis inducere 11 die Febr. etc. in presentia et auditu diversorum personarum, falso, militiose, diabolice et

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He likewise assisted in prosecuting the famous Beau Feilding¹ for bigamy in marrying the Duchess

scient', et ut falsus impostor, prætenebat et asserebat seipsum per eand' Saram fuisse fascinaturn (Anglice, bewitched) et occasione fascination' illius non posse edere et per magnum tempus scil' per tempus decem septeminar' jejunasse, ac diversis morbis affici, et quod ipse per ipsius Richardi extractionem sanguinis ejusd' Saræ per sculptionem a prætens' fascinatione præd' liberat' foret; quodque prædict' Richardus, vi et armis eandem Saram scalpsit, et sanguinem ipsius Saræ per scalption' ill' extraxit, etc., ubi revera et in facto præd. Richard' nunquam fascinaturn fuit et nunquam jejunasset per spatium præd' nec per aliquod magnum tempus," etc. etc. The sentence will give pleasure. After saying that he is to pay a fine of 100 marks, it thus proceeds: "Et quod stabit in et super pilloriam Die Sabbati proximo in magis publico et aperto loco in Southwarke, inter horam decimam et horam tertiam ejusdem diei per spatium duarum horarum cum papiro super caput ejus denotante offensam suam," etc. ["And on the next holiday he shall be placed in the pillory, in the most public and most open square in Southwarke, between ten and three o'clock, for the space of two hours wearing upon his head a paper stating his offence," etc.] The same ceremony is to be repeated before the Royal Exchange, and again at Temple Bar. Then he was to be committed to the House of Correction: "Et quod flagelletur die proximo post adventum suum in Domum Correctionis prædict' et quod custos prædict' custodiat eum quotidie ad duram laborem per spatium dimidii unius anni." ["On the day following his arrival at the House of Correction, he shall be scourged, and shall then be sentenced to hard labor for the space of six months."]—14 *St. Tr.* 639.

1. Robert Feilding, called Beau Feilding (1651?–1712), was related to the Denbigh family. In his will he describes himself as of Feilding Hall, Warwickshire, and makes a bequest of property in Lutterworth parish, Leicestershire. He wasted a fair income, and became notorious for his many amours even at the court of Charles II., where he was known as "Handsome Feilding." Swift, in his fragment of autobiography, says that Beau Feilding married Mary, only daughter of Barnham Swift, Viscount Carlingford, and squandered her property. James II. gave him a regiment, and he is said to have put down a Protestant riot. He afterwards married Mary, only daughter of Ulick de Burgh, first Marquis Clanricarde. He became a Catholic, followed James to Ireland, and sat in the Irish Parliament of 1689 for Gowran. In January, 1691–92, he was in Paris, and trying to obtain his pardon. He did not succeed until 1696, when he returned to England, and was for a time committed to Newgate. His wife died in 1695. In the reign of Queen Anne he became conspicuous as a surviving relic of the rakes of the Restoration period, and endeavored to retrieve his fortunes by marriage. He promised 500*l.* to a Mrs. Villars if she would bring about his marriage to a Mrs. Deleau, a widow with a fortune of 60,000*l.* Mrs. Villars, who was Mrs. Deleau's hair-dresser, contrived to pass off a certain Mary Wadsworth upon Feilding under Mrs. Deleau's name. Feilding at their second interview fetched a Roman Catholic priest from the Emperor's

of Cleveland, his former wife being then living. The case turned chiefly upon the validity of the first marriage by a Roman Catholic priest in a private room, and Mr. Raymond's argument to prove its validity prevailed.¹

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A.D. 1706.
Prosecution of
Beau Feilding
for bigamy.

Being much connected with the Jacobites, he was employed as counsel for David Lindsay, member of a distinguished family in Scotland, who, having gone from that country to France, in the service of the exiled James II., had come into England without having obtained permission under the Privy Seal to do so, and was now indicted on an act of the English Parliament which made it treason for any of the King's subjects who were abroad when it passed, to come into England, without the King's permission under the Privy Seal first had and obtained. The facts were not disputed, and the case resolved itself into a question of law, "whether a native of Scotland was bound by this statute?" Mr. Raymond powerfully argued that,

A.D. 1710.
Raymond
is counsel
for Lind-
say the
Jacobite.

His power-
ful argu-
ments.

ambassador, who performed the marriage ceremony November 9, 1705. He had been simultaneously courting the Duchess of Cleveland, the old mistress of Charles II. and others. He married her November 25, 1705. He appears to have bullied or beaten both his wives. The first wife, from spite or for a reward, told her story to the Duke of Grafton, grandson of the Duchess of Cleveland. Feilding was thereupon prosecuted for bigamy at the Old Bailey, December 4, 1706. He was convicted, after trying to prove, by the help of a forged entry in the Fleet register, that Mary Wadsworth was already the wife of another man. He was admitted to bail, having the Queen's warrant to suspend execution. At the trial he is called "colonel" and "major-general." Feilding is said, in a catchpenny Life of 1707, to have been at one time, apparently under Charles II., a justice of the peace for Westminster; and in March, 1687, Luttrell mentions a Colonel Feilding as one of the Middlesex justices who requested the King to dispense with the taking the test. In 1709 Steele described Feilding as Orlando in the "Tatler." He was afterwards in the Fleet, and, having compounded with his creditors, lived with his wife at Scotland Yard, where he died May 12, 1712, aged 61.—*Dict. Nat. Biog.*

1. 14 St. Tr. 1327. *Secus* if the clergyman had been a Presbyterian minister. This compliment to the Church of Rome became necessary from the Anglican Church acknowledging the sufficiency of Popish orders, so as to keep up its own descent from the Apostles.

CHAP. XXVI. Scotland and England remaining separate and independent, the Parliament of England could not legislate for Scotland or Scotchmen: but, in answer, the Attorney General cited *Calvin's case*, which was intended for the benefit of Scotland, and by which it was decided that all Scotchmen born since the union of the crowns by the accession of James I. were to be considered entitled to the same privileges as native-born Englishmen. Mr. Raymond, in reply, without impeaching the authority of this very questionable judgment, argued that a native-born Scotchman might be permitted to inherit and hold lands in England, without being liable while he remained in his own country, or did not reside in England, to be subjected to the pains of treason by an English Parliament. Chief Justice Holt and the other Judges present overruled the defence, and sentence of death was passed upon the prisoner; but, the public being shocked by such a straining of the law, he was respited and pardoned.¹

May 13.
Raymond
made
Solicitor
General by
the Tories.

Mr. Raymond, although he devoted the greatest portion of his time to his profession, was by no means indifferent to politics, and still cherished a cordial hatred of the Whigs. He saw, therefore, with extreme delight the blunder which they committed in the impeachment of Sacheverell, and he assisted Harcourt with his advice in defending the champion of the High Church. Accordingly, he was rewarded with the office of Solicitor General, and received the honor of knighthood.

As member for Lymington, in Hampshire, he now entered the House of Commons; but he seems to have confined himself, while in office, to the routine law business of the Government there.

He attached himself chiefly to Bolingbroke, and he is supposed to have been privy to the scheme of

1. 14 St. Tr. 987-1036.



GEORGE I.



this bold intriguer to bring in the Pretender at the death of Queen Anne.¹ Of course he was turned out on the accession of George I.

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For six years he remained in opposition,—occupied, like most of his contemporaries, in intriguing alternately with the banished royal family, and with Tories who were willing to submit to the established order of things if they themselves might hope by any chance to get into power.

The only great display of his eloquence preserved to us is his speech against the Septennial Bill,² which is very curious as showing us that the Church-and-King men of that day held the same language with the modern Chartists respecting annual parliaments:

A.D. 1716.
His speech
against the
Septennial
Bill.

"I fear," said he, "the prolonged duration of parliaments will be no cure for the general corruption supposed to arise

1. On July 20, 1714, Mrs. Danvers, the chief lady in waiting, found the Queen staring vacantly at the clock in her Presence Chamber, "with death in her look." It was an apoplectic seizure. On her death-bed she gave a last evidence of the love towards her people which had been manifested through her whole reign, by saying, as she placed the Lord Treasurer's wand in the hands of the Duke of Shrewsbury, "For God's sake use it for the good of my people." But from that moment, having accomplished her last act as Queen, Anne seems to have retraced in spirit the acts of her past life, and to have been filled with all the agonies of remorse for her conduct to her father and his son—"O my brother, my poor brother, what will become of you?" was her constant cry. To the Bishop of London, who was watching beside her, she intrusted a message, which he promised to deliver, but which he said would cost him his head. On hearing of her repentance the Jacobite lords hurried to Kensington. Atterbury proposed to proclaim the Chevalier at Charing Cross; the Duke of Ormonde would join him if the Queen could but recover consciousness to mention him as her successor. Lady Masham undertook to watch her, but it was too late. "She dies upwards, her feet are cold and dead already," were her hurried words in the ante-chamber; and by eight o'clock on Sunday morning, August 1, 1714, "good Queen Anne" was dead.—*Hare's Walks in London*, vol. ii. p. 459.

2. The Septennial Act (1716), which increased the length of Parliament to seven years, was passed partly because the Triennial Act of 1694 had not worked well in practice, but still more because the very excited state of popular feeling in consequence of the Jacobite revolt made it unsafe for the Whig ministry to run the risk of a general election.—*Low and Rulling's Dict. of Eng. Hist.*

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from frequent elections; for as the period for which the member is to sit is prolonged, the price of his return will increase in the same proportion. An annuity for seven years deserves a better consideration than for three, and those who are willing to give money for their seats will be governed in the bargain by the true principles of commerce. Nothing will so effectually check corruption as annual parliaments. That was our ancient constitution, and every departure from it has been mischievous. A long parliament is plainly destructive of the subject's right, and many ways inconsistent with the good of the nation. Frequent new parliaments are our constitution, and the calling and holding of them was the practice for many ages. Before the Conquest, parliaments were held three times every year,—at Christmas, Easter, and Whitsuntide. In Edward III.'s reign it was enacted 'that parliaments shall be holden every year, or oftener if need be.' This must be understood of new parliaments, for prorogations and long adjournments were not then known, and were not heard of till the reign of Henry VIII., who found that it best suited his tyrannical purposes to keep up a standing body of slavish representatives whom he had corrupted or intimidated." After giving at great length the history of the Triennial Act¹ about to be repealed, he thus concluded: "Frequent and new parliaments create a confidence between the King and his people. If the King would be acquainted with his people and have their hearts, this is the surest way. I can hardly think that you wish to perpetuate yourselves; yet you might do so on the same arguments; and if you pass this bill, I cannot doubt but that before the end of the seven years there will be another bill for a further prolongation. But at the end of the time for which you were chosen, the people will say 'you are no longer our representatives; we chose you for three years and no longer, and you cannot choose yourselves for an extended period; henceforth you are usurpers, and we have a right to put you down.' And I must say that, in my own poor opinion (with great submission do I speak it), King, Lords, Commons, can no more continue a parliament, than they can create a parliament without the choice of the people."²

1. A Triennial Bill (1694) enforced the assembly of the Houses every three years, and bound the returning officers to proceed to election if no royal writ were issued to summon them.—*Green's Hist. of the Eng. People*, vol. iii. p. 190.

2. 7 Parl. Hist. 335.

As the seeming stability of the new dynasty improved, the high Toryism of Sir Robert Raymond was softened down; and, at last, he was induced to take office, along with Walpole and Townshend, in the administration of Lord Stanhope.¹ A vacancy in the office of Attorney General arose, when (*horresco referens*) Letchmere, who had enjoyed some eminence in his day, was consigned to oblivion by being created Chancellor of the Duchy of Lancaster and a peer. Raymond had contracted an intimacy with Walpole during the short period when this sagacious statesman was himself in opposition; and, being warned by him against the evils of permanent banishment from power, professed to discover that the Whigs were now much more reasonable than when headed by Godolphin and Marlborough, and declared that he might join them without any sacrifice of principle or consistency. He refused to serve under Sir Philip Yorke,² who, about a year before, had been appointed Solicitor General, at the age of 28, and whose friends were impatient for his further promotion. Many taunts were thrown out against the renegade Tory; but Walpole, knowing his value as a law officer

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(A.D. 1720.

His intimacy
with
Walpole.He joins
the Whigs
and is
made
Attorney
General.

1. James, first Earl of Stanhope, a celebrated English nobleman, who early entered upon a military career, and distinguished himself so much at the siege of Namur, in 1695, that William III. gave him a company in the Guards, and the rank of lieutenant-colonel. He was made major-general and commander-in-chief of the British forces in Spain by Queen Anne. George I. appointed him Secretary of State in 1714, and sent him as ambassador to Vienna. In 1717 he was appointed First Lord of the Treasury and Chancellor of the Exchequer, but relinquished these offices on being created a peer soon afterwards. Born 1673; died in London, 1721.—*Beeton's Biog. Dict.*

2. Philip Yorke, Earl of Hardwicke (*b.* 1692, *d.* 1764), lawyer, entered Parliament in 1717, and next year became Solicitor General. After being Attorney General for ten years, he became in 1730 Chief Justice of the King's Bench, and was made a peer. In 1737 he was given in addition the office of Lord Chancellor, which he held till 1756, his tenure of office being marked by the passing of the Marriage Act. He did not take office again, but his advice was much valued.—*Cassell's Biog. Dict.*

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XXVI.
May 9.

of the Crown, warmly supported him, and, on the retirement of Letchmere, he became Attorney General.

Oct. 1722.
His speech
for the
Crown in
prosecut-
ing Laver.

It is to the credit of Raymond and Yorke that they acted together very cordially. The chief state trial which they had to conduct jointly was the prosecution of Christopher Laver for high treason. On this occasion, Mr. Attorney General Raymond thought himself bound to show that he was now entirely free from the taint of Jacobitism, and thus he commented upon the prisoner's scheme to bring in the Pretender :

“ Gentlemen of the Jury : You will readily agree with me that nothing can be more dreadful to a true Briton who hath any regard for himself or his posterity, or love to his country, than the fatal consequences which must inevitably have attended such wicked designs had they been carried into execution with success. What could any one have expected from a rebellion in the heart of the kingdom, but plunder and rapine and murder, a total suspension of all civil rights, and a terrible apprehension of something yet worse to come? All this must have been endured, even if the attempt should have been disappointed at last. But had it prospered, had his Majesty's sacred person been seized and imprisoned, and had the Pretender been placed on the throne, what a scene of misery had opened ! A mild administration, governed by the law of the land under an excellent prince and as just and merciful as ever wore the crown, must have given way to arbitrary rule under a popish tyrant ; all your estates must have been at the will of a provoked and exasperated usurper ; liberty must have been for ever subverted, and the best of religions would be suppressed by Romish superstition and idolatry. Nor would these dreadful calamities have been confined within the bounds of his Majesty's dominions ; for should the present happy establishment in this kingdom (the chief bulwark of the Reformation) be destroyed, there is great reason to fear that the Protestant religion would ere long be extinguished.”

He then proceeded to open the facts of the case in a style of invective and rhetorical exaggeration which would be very much censured in an Attorney General of the present times, but which was then thought quite

excusable. The prisoner was certainly guilty, and Raymond, by all except his old friends the Jacobites, was praised for convicting him.¹

Nevertheless, Mr. Attorney found his position, both at the bar and in the House of Commons, rather irksome. Bishop Atterbury's² case came on; and, in taking part against this celebrated prelate, he incurred much odium, and was often reproached as a turncoat. He therefore wished for the tranquillity of the bench; and, there being no chiefship likely to become vacant soon, he astonished the world by sinking into a Puisne Judge of the Court of King's Bench, in the room of Mr. Justice Eyre. There never before had been an instance of an Attorney General accepting a puisne judgeship, and hardly any of his condescending even to become Chief Baron of the Exchequer. Till the Revolution, when parliamentary government was established, and the practice began of his going out with the administration which had appointed him, his tenure was as secure as that of the judges; and, drawing higher emoluments than any of them, the Great Seal alone could tempt him readily to give up his office as long as his health and strength enabled him to discharge its laborious duties. Raymond now, probably, rued his *ratting*, but return to Toryism was impossible, and his only resource was a retreat in which he would be entirely rescued from politics.

On the 31st of January, 1724, he was called Ser-

1. 16 St. Tr. 94-324.

2. Francis Atterbury (1662-1732), Bishop of Rochester, espoused the Jacobite cause, and on the death of Anne implored the ministry to proclaim James III. Disliked by George I. because of his refusal to sign the Bishops' Declaration of Fidelity, he began, in 1717, to correspond directly with the Pretender. On the failure of Atterbury's plot to restore the Stuarts he was imprisoned, and a Bill of Pains and Penalties being introduced, he was forced to leave England, professing his innocence. For a time he resided at Paris, and was chief adviser of the Pretender.—*Low and Pulling's Dict. of Eng. Hist.*

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He finds
his position
at the bar
and in Par-
liament
irksome.

He incurs
odium in
taking part
against
Atterbury.

A.D. 1724.
He sinks
into a
Puisne
Judge.

CHAP. XXVI. geant, giving rings with the motto "*Salva libertate, potens*,"¹ and, on the 3d of February following, he took his seat as junior Judge in the Court of King's Bench.²

Henceforth he devoted himself exclusively to his judicial duties, and he soon showed that he was destined to acquire the reputation of a great magistrate. He was not only familiarly acquainted with all professional technicalities, but he possessed an enlarged understanding, and he was capable of treating jurisprudence as a science. He, therefore, rose very much in public estimation, and (what was of more importance to his further advancement) he retained the friendship of Sir Robert Walpole,³ who had become Prime Minister, and was desirous of indemnifying him for the sacrifices he had made in joining the Whigs.

He rises
in public
estimation.

He is appointed a
Commissioner
of the
Great Seal.

A.D. 1725.
He is made
Chief Justice
of the
King's
Bench.

Accordingly, he was appointed a Lord Commissioner of the Great Seal when Lord Macclesfield was forced to resign it; and some thought that he was likely to be the successor of that illustrious delinquent. But it so happened that, about the same time, Lord Chief Justice Pratt died, and he infinitely preferred the

1. "Powerful, liberty being preserved."

2. The next judge who followed this example was Sir Vicary Gibbs. "When Mr. Percival was shot at," says Lord Brougham, "his nerves, formerly excellent, suddenly and entirely failed him; and he descended from the station of Attorney General to that of a Puisne Judge in the Common Pleas."—*Statesmen*, vol. i. p. 133.

3. Sir Robert Walpole, Earl of Orford, a celebrated English statesman, who in 1700 commenced his parliamentary career as member for Castle Rising. Rapidly acquiring fame as a politician, he became, in 1708, Secretary at War and leader of the Whig party in the House of Commons; but when the Tories under Harley and St. John obtained power, Walpole was, with other members of the late Whig administration, voted by the Commons to be guilty of corruption, and ordered to be expelled the House. At the accession of George I. the Whigs again became the leading party, and Walpole was made Paymaster General of the Forces. During the troubles caused by the rebellion of the Pretender he was nominated First Lord of the Treasury and Chancellor of the Exchequer. A change of administration taking place in 1717, he remained in opposition during three years. In 1721 he was appointed First Lord of the Treasury, which office he held for more than twenty years. Born 1676; died 1745.—*Beeton's Biog. Dict.*

chiefship of his own court to being again launched on the tempestuous sea of politics. He himself, at the commencement of his Reports for Easter Term, 1725, gives us this simple statement of his elevation :

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"*Memorandum*: that Sir John Pratt, Knight, Chief Justice of the King's Bench, died Wednesday, February the 24th last past, and I was created Chief Justice in his place by writ bearing teste March 2, and was sworn into the office March 3 following before Sir Joseph Jekyll, Knight, Master of the Rolls, and Sir Jeffery Gilbert, Knight, one of the Barons of the Exchequer, then two of the Lords Commissioners for the custody of the Great Seal; notwithstanding which, I continued one of the Commissioners of the Great Seal, and Sergeant Reynolds was sworn in before me and the other Lords Commissioners to be my successor as a Puisne Judge."¹

His statement of his elevation.

He continued to preside in the Court of King's Bench, with high distinction, above seven years; and, as a testimony of respect for his services, he was raised to the peerage by the title of Lord Raymond, Baron Raymond of Abbots Langley in the county of Hertford, being the third Chief Justice of the King's Bench who had received a similar honor.²

He is raised to the peerage, Jan. 15, 1731.

We know from contemporary testimony that he was much admired and respected as head of the Com-

1. 2 Lord Raymond, 1381.

2. Coke, Hale, and many others, are still called Lords; but Jeffreys and Parker were the only preceding Chief Justices who had been ennobled, and doubts had been entertained whether a peer could sit as a common-law judge. "1730(1), Jan. 21. Then Sir Robert Raymond, Kt., Ld. Ch. J. of His Majesty's Court of King's Bench, being, by letters patent, dated 15 die Januarii 1730, Annoq. regni Georgii Secundi Regis Quarto, created Lord Raymond, Baron of Abbots Langley, in the county of Hertford, was, in his robes, introduced, between the Lord De Lawarr and the Lord Bingley, also in their robes; the Gentleman Usher of the Black Rod, Garter King of Arms, the Deputy Earl Marshal of England, and the Lord Great Chamberlain, preceding. His Lordship presented his patent to the Lord Chancellor, on his knee, at the woolsack; who delivered it to the clerk; and the same was read at the table. His Lordship's writ of summons was also read," etc. He then took the oaths, and was "placed on the lower end of the Barons' bench."—23 *Lords' Journals*, 591, 592.

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He fails to
do justice
to himself
in his Re-
ports of his
own de-
cisions.

mon Law; but we have now very slender means of estimating his merits. Although he continued the Reporter of the Court of King's Bench, and he has handed down to us many of his own decisions, he does by no means the same justice to himself which he had done to Lord Holt. This Chief would have been immortalized by his judgments in the *Aylesbury Case* ¹ on

1. The Aylesbury Election Case (1704) (or the case of *Ashby v. White*) produced a violent collision between the House of Commons and the Lords. The vote of a burgess, Matthew Ashby, had been rejected by the returning officer, William White. Ashby brought an action in the Court of Queen's Bench. There a majority of the judges, contrary to the opinion of Chief Justice Holt, decided against him on the ground that no harm had been done to him, and that decisions on the right to vote belonged to the Commons alone. Ashby's supporters thereupon brought the case by writ of error before the House of Lords. Here the judgment given at the Queen's Bench was reversed, and, by this important decision, franchises were placed under the common law. In spite of the wise advice of the Whig lawyers William Cowper and Sir Joseph Jekyll, the Commons proceeded to pass resolutions to the effect that (1) neither the qualifications of any elector nor the right of any person elected was cognizable elsewhere than before the House of Commons; (2) that Ashby, having in contempt of the jurisdiction of the House prosecuted an action at common law against William White, was guilty of breach of privilege. The Lords passed contrary resolutions, and the quarrel became so serious that early in April Queen Anne put an end to the session. Ashby, however, sued out execution for the damages awarded him at the county assizes against the returning officers who had refused to receive his vote. In addition, four other burgesses were put forward to sue the officers. The Commons promptly committed the plaintiffs and their attorney to Newgate. The prisoners, after two months, moved the Court of King's Bench for a *habeas corpus*; but these judges, contrary to the opinion of Holt, who was for the discharge of the prisoners, decided that the court had no jurisdiction in the matter. It was determined to bring this by writ of error before the Lords. The Commons foolishly voted an address to the Queen praying her not to grant a writ of error. Her reply, that the matter required careful consideration, was looked on as equivalent to a refusal. The Lords thereupon passed some important resolutions: (1) That neither House of Parliament could arrogate to itself any new privilege; (2) that the Commons had assumed an unwarranted legislative power by attributing the force of law to their declaration; (3) that they had thereby subjected the rights of Englishmen to the arbitrary votes of the House of Commons; (4) that every Englishman who is imprisoned by any authority whatever has an undoubted right to his writ of *habeas corpus*; (5) that for the Commons to punish any person for assisting a prisoner to procure such a writ is a breach of the statutes provided for the liberty of the subject; (6) that a writ of error was not one of grace, but of right, and ought not to be denied to the subject when duly applied for.



LORD RAYMOND.



parliamentary privilege, and in *Coggs v. Bernard* on the doctrine of bailments, as Lord Raymond has given them to the world—but, from modesty, or from want of leisure, or from carelessness, during the time when he himself presided, he hardly ever mentions the Chief Justice separately, and generally introduces the determination of the case with the words "*per Curiam*," or "the Court thought," or "we were all agreed." Nor do the cases at that period seem to have been numerous or important; and, to fill up time, and to appear to have an air of business, the most was made of every matter which came on for adjudication. Thus the question "whether *nil debet*¹ was a good plea to an action of debt on a deed to recover a penalty for breach of covenant?" was solemnly argued four different times, in four successive terms, before the Court would hold the plea to be bad.²

But I can give specimens of Lord Chief Justice Raymond's performances which do him credit. He it was who first established the important doctrine that to publish an obscene libel is a temporal offence, subjecting the party to be prosecuted and punished as for a misdemeanor. The infamous Edmund Curl,³ held

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His doctrine that a publisher of an obscene libel may be prosecuted for a misdemeanor. A.D. 1727.

A fairly amicable conference between the two Houses produced no result, as neither side would give way. The Queen, therefore, prorogued Parliament (March 14th), thus leaving a great constitutional question wholly undecided.—*Low and Pulling's Dict. of Eng. Hist.*

1. "He owes nothing"—a plea denying a debt.

2. *Warren v. Cousell*, Tr. Term 15 Geo. I.: 2 St. Tr. 778.

3. Edmund Curll, or Curl (1675-1747), bookseller, was born in 1675, in the west of England, of humble parentage. Like other booksellers of the time, Curll sold patent medicines. He had not been long in business when he began a system of newspaper quarrels with a view to force himself into public notice. In 1716 Curll had his first quarrel with Pope on the publication of "Court Poems," in March, 1716, by James Roberts, a minor bookseller. The fame of "Dauntless Curll" lives in some of the most unsavory lines of the "Dunciad," but we know that the poet and bookseller were quarrelling for twenty years. He had knowledge and a ready pen, plenty of courage, and more impudence. He had no scruples either in business or private life, but he published and sold many good books.—*Stephen's Dict. of Nat. Biog.*

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Edmund
Curl's
Case, con-
tinued.

up to eternal detestation and ridicule by Pope in the DUNCIAD, was charged by a criminal information in the language then used—"Quod ille existens homo iniquus et sceleratus ac nequiter machinans et intendens bonos mores subditorum hujus regni corrumpere, et eos ad nequitiam inducere, quendam turpem et obscœnum libellum, intitulum 'Venus in the Cloister, or the Nun in her Smock,' impie et nequiter impressit et publicavit ac imprimi et publicari causavit [setting out the several lewd passages in English] in malum exemplum,"¹ etc. Having been tried and found guilty by the jury, his counsel moved in arrest of judgment on the ground that, however he might have been punishable in the Ecclesiastical Court for an offence *contra bonos mores*, this was not an offence of which the common law could take cognizance; arguing that "notwithstanding the filthy run of obscene publications in the reign of Charles II., there had been no prosecution for any of them in the temporal courts, and that whatever tends to corrupt the morals of the people ought to be censured only as an offence against religion by my Lords the Bishops." Of this opinion was Mr. Justice Fortescue,² who said,—

1. "It has come to light that that dangerous and wicked man, basely plotting and seeking to corrupt the good morals of the subjects of this realm, and to lead them into paths of wickedness, has printed and published, and caused to be printed and published, for an evil example, a certain disgraceful and obscene libel, entitled 'Venus in the Cloister, or the Nun in her Smock,'" etc.

2. William Fortescue (1687-1749), Master of the Rolls and friend of Pope and Gay, the only son of Henry Fortescue of Buckland Filleigh in Devonshire. He chose the law as his profession, and his name was entered at the Middle Temple in September, 1710, but he removed to the Inner Temple in November, 1714, and was called by it in July, 1715. When Sir Robert Walpole was appointed Chancellor of the Exchequer in 1715 he selected Fortescue as his private secretary. At the general election in 1727 he was returned for the borough of Newport in the Isle of Wight, a constituency which he continued to represent until 1736, and rendered, unlike most of Pope's friends, a warm support to the ministry of Walpole. At the bar Fortescue's progress was steady, as befitted a sound but not a brilliant lawyer. In 1730 he was appointed King's

"I own this is a great offence, but I know of no law by which we can punish it. Common law is common usage, and where there is no law there can be no transgression. At common law, drunkenness and cursing and swearing were not punishable. This is but a general solicitation of chastity; and to make it indictable, there should be a breach of the peace."

Lord Raymond, C. J.: "I am of opinion that to publish any writing which reflects on religion, virtue, or morality, is an act which tends to disturb the civil order of society, and is a temporal offence. It is not merely a sin, but a crime; it is directly hurtful to others, as well as contrary to the soul's health of the offender. Why is this court called the *censor morum* if we cannot punish that which subverts all morality? For verbal scandal there may be a suit in the spiritual court, and penance may be inflicted; but for the injury done to the public by an obscene libel, this is the proper tribunal."

The matter stood over till another term, when, Mr. Justice Page¹ having succeeded Mr. Justice Fortescue,

Counsel and Attorney General to the Prince of Wales; on Feb. 9, 1736 he was raised to the judicial bench as a Baron of the Exchequer, and on July 7, 1738, he was transferred to the Court of Common Pleas. His final advancement was to the Mastership of the Rolls (Nov. 5, 1741), when he was called to the Privy Council (Nov. 19), and he sat in that court until his death.—*Stephen's Dict. of Nat. Biog.*

1. Francis Page was the son of the Rev. Nicholas Page, the vicar of Bloxham in Oxfordshire, and was born about 1661. Admitted at the Inner Temple, he was called to the bar in 1690, and was raised to the bench of that society in 1717. He varied his legal studies by entering into the political controversies of the time, taking the Whig view of the subjects in discussion, and adding some pamphlets to those which then almost daily issued from the press. In 1705 he appeared as one of the counsel for the electors of Aylesbury who had been committed by the House of Commons for proceeding at law against the returning officers, who had illegally refused their votes. The Commons, having then resolved that the counsel had thereby been guilty of a breach of privilege, ordered their committal to the custody of the Sergeant-at-arms. Page evaded the arrest, and Queen Anne was obliged to dissolve the Parliament in order to prevent a collision between the two Houses on the question. He was member for Huntingdon in the two parliaments of 1708 and 1710, and soon after the accession of George I. he received the honor of knighthood, and was not only made a Sergeant, but also King's Sergeant, in 1715. An early opportunity was taken of promoting him to the Bench, and on May 15, 1718, he took his seat as a Baron of the Exchequer. On November 4, 1726, he was removed from the Exchequer to the Common Pleas, and in the middle of September, 1727, three

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Curl's
Case,
continued.

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settles the
law re-
specting
murder
and man-
slaughter.A. D. 1725.
Major
Oneby's
Case.

the Judges were unanimous in discharging the rule to arrest the judgment, and the defendant was set in the pillory, "as," says the reporter, "he well deserved."¹

It was in Lord Raymond's time that the law of murder and manslaughter was brought to the degree of precision in which we now find it, with all its nice distinctions and refined qualifications. The practice then prevailed of the jury finding the facts by a special verdict, and leaving the guilt or innocence, or the degree of guilt, of the prisoner as a question of law to the judges.

One of the most interesting cases of this kind was the trial of Major Oneby for the murder of Mr. Gower. These two gentlemen, noted for their fashion and gallantries, had a dispute while playing at hazard in a tavern in Drury Lane,² and the prisoner called the

months after the accession of George II., he was again translated to the King's Bench. Though then sixty-six years of age, he remained on the Bench fourteen years more, dying on October 31, 1741. He has left behind him a most unenviable reputation. Without the abilities of Judge Jeffreys, he was deemed as cruel and as coarse. The few reported cases in the State Trials at which he presided do not indeed appear to warrant this character, nor does his learned judgment in Ratcliffe's case, reported in 1 Strange (269); but he could not have been known among his contemporaries by the sobriquet of the "hanging Judge," nor have obtained the inglorious distinction of being stigmatized by some of the best writers of the age, unless there had been pregnant grounds for the imputation. Pope, in his Imitation of the First Satire of the Second Book of Horace, thus introduces him:

"Slander or poison dread from Delia's rage,
Hard words or hanging if your judge be Page."

When Crowle the punning barrister was on the circuit with Page, on some one asking him if the Judge was *just behind*, he replied, "I don't know, but I am sure he never was *just before*." When old and decrepit, the Judge perpetrated an unconscious joke on himself. As he was coming out of court one day, shuffling along, an acquaintance inquired after his health. "My dear sir," he answered, "you see I keep *hanging on, hanging on*."—*Foss's Lives of the Judges*.

1. 2 Str. 788; 17 St. Tr. 153.

2. Duke Street and Prince's Street lead into Drury Lane, one of the great arteries of the parish of St. Clement Danes, an aristocratic part of London in the time of the Stuarts. It takes its name from Drury House,

deceased "an impertinent puppy;" the deceased answered, "whoever calls me so is a rascal." The prisoner then threw a bottle at the head of the deceased, which brushed his peruke as it passed, and beat some hair-powder from it. Thereupon the deceased tossed a candle at the prisoner without hitting him. They both drew their swords, but were prevented by the company from fighting, and again sat down to play. At the expiration of an hour the deceased said to the prisoner, "We have had hot words; you were the aggressor, but I think we may pass it over," and at the same time offered him his hand;—to which the prisoner answered, "No, damn you! I will have your blood." The reckoning being paid, the company had all left the room except the prisoner, who, addressing the deceased, said, "Young man, come back; I have something to say to you." The deceased returned. Immediately the door was closed, and the clashing of swords was heard. When the company reëntered they found that the deceased had been run through the body by the prisoner,—and next day he died of his wounds. The prisoner had received three slight wounds in the rencounter. The deceased on his death-bed being asked "whether he received his wound in a manner called *fair* among swordsmen?" answered "I think I did." The jury found that, "from the throwing of the bottle till the mortal thrust was given, there had been no reconciliation between the parties;—but whether this was murder or manslaughter, they prayed the advice of the

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The Major
Oney's
Case,
continued.

built by Sir William Drury in the time of Henry VIII. The respectability of Drury Lane began to wane at the end of the seventeenth century, and Gay's lines,

"Oh may thy virtue guard thee through the roads
Of Drury's mazy courts and dark abodes!"

are still as applicable as when they were written.—*Hart's Walks in London*, vol. i. p. 92.

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Major
Oney's
Case,
continued.

Court." The counsel were about two years in drawing up the special verdict which stated these facts; and the prosecutor took no steps to bring the case to a hearing, seeming rather inclined to let the proceedings drop. But the prisoner, who had been living all the time gayly in Newgate, grew very confident, and feed counsel to move the Court to fix a day for proclaiming his innocence. The special verdict was twice argued; first before the four Judges of the King's Bench, and then before all the twelve Judges of England.

Sergeant Eyre and *Mr. Lee* (afterwards Chief Justice), counsel for the prisoner, argued that this was a case of manslaughter, for which the punishment was merely burning in the hand; contending that "there was here no *malice aforethought*, which was necessary to murder; the killing was on a sudden occasion; manslaughter is killing without premeditation; *ira furor brevis est*;¹ and therefore, as a madman, the party is excused for what he does in a transport of passion: the calling the prisoner a *rascal* was what no man of honor could put up with, and this was the beginning of the quarrel: the fighting was as sudden as the reproachful words; words alone would not reduce the offence to manslaughter, and if the prisoner had at once stabbed the deceased it might have been murder; but there was an interchange of blows, and the deceased himself allowed that it was a *fair fight*; there was an interval, but no reconciliation, and the law has fixed no certain time when the presumption arises that the passions of men are cooled: besides, no one saw the beginning of the actual affray; the deceased certainly struck several blows, and might have first struck and wounded the prisoner before the latter even drew his sword the second time: the law under such circumstances would mercifully presume *provocation*, which would reduce the case to manslaughter."

Lord Raymond, in a very long and most admirable judgment, pronounced the unanimous opinion of all the Judges that the prisoner was guilty of murder. After showing that the malice necessary to constitute

1. "Anger is a short madness."

murder was not a settled anger or long-cherished revenge, but unprovoked deadly violence without provocation or excuse, he observed,—

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Major
Oneby's
Case,
continued.

“Mr. Gower did nothing that could reasonably raise a passion in Major Oneby. The answer of Mr. Gower, on being called *an impertinent puppy*, was not more than might have been expected, that ‘whosoever called him so was a rascal.’ Major Oneby, who had begun the abusive language, then violently threw the glass bottle. After they had been restrained from fighting, and had sat an hour at play, the proposal of Mr. Gower ought to have appeased Major Oneby; but what was his answer? ‘No, damn you, I will have your blood!’ These words show his malicious intent even in throwing the bottle. Then followed the imperious and insolent command, ‘Young man, I have something to say to you!’ As soon as Mr. Gower had returned, the door is shut, and a clashing of swords is heard, when Mr. Gower received the mortal wound of which he died. If the prisoner had malice against the deceased, though they fought after the door was shut, the interchange of blows will make no difference; for if A. has malice against B. and meets B. and strikes him, B. draws, A. flies to the wall, A. kills B., it is murder. Nay, if the case had been that there was mutual malice, and they had met and fought, the killing had been murder. All the Judges are of opinion that in this case there was malice in the prisoner. The defence rests upon this being a sudden quarrel in which there was great provocation from the deceased; but if there was sufficient time for the blood to cool, and reason to get the better of the transport of passion before the mortal wound was given, the killing will be murder, and all the Judges are of opinion that the act was deliberate. It was not necessary that *malice* should be found by the jury in the special verdict. This is matter of law for the Court. The jury may find a general verdict, either that the prisoner is guilty of murder or of manslaughter; but if they find the facts specially, the Court is to draw the conclusion, whether there was malice, or whether the deed was done on a sudden transport of passion. It has been adjudged that if two men fall out in the morning, and meet and fight in the afternoon, and one of them is slain, this is murder, for there was time to allay the heat, and their meeting was of malice. Though the law of England is so far peculiarly favorable (I know no other law that makes such

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Case,
continued.

a distinction between murder and manslaughter) as in some instances to extenuate the greatest of private injuries, as the taking away a man's life is, yet it must be such a passion as for the time deprives him of his reasoning faculties; for if it appears that reason has resumed her sway over him, if it appears that he reflects, deliberates, and considers before he gives the fatal stroke, the law will no longer, under the pretext of passion, exempt him from the punishment inflicted on murder. It is urged that, from the prisoner's three wounds, a new and sudden quarrel might have arisen, in which Mr. Gower might be the aggressor; but it lies on the party indicted to prove this quarrel, and none such being found by the jury, we are not at liberty to presume that there was any. The last fact relied upon is, that Mr. Gower on his death-bed allowed that the *fight was fair*. The answer is, that if A. have malice against B., and they meet and fight, though the fight is never so fair according to the law of arms, yet if A. kills B. it will be murder." Lord Raymond then cited all the authorities on the subject from the earliest times in support of the doctrines he had laid down, and he concludes his own report of the case with the following "*Memorandum*: As soon as I had delivered this resolution, I desired my brothers Fortescue, Reynolds, and Probyn, that if they disapproved anything I had laid down, they would express their disapprobation, but they publicly declared that they consented *in omnibus*."¹

The prisoner declared that, "as he hoped for mercy at the hands of Almighty God, he had never used the expression so much pressed against him, '*I will have your blood*;' " and, having fought with distinction in all the Duke of Marlborough's campaigns, he prayed "that he might be recommended to his Majesty's clemency for his past services in the cause of his country."

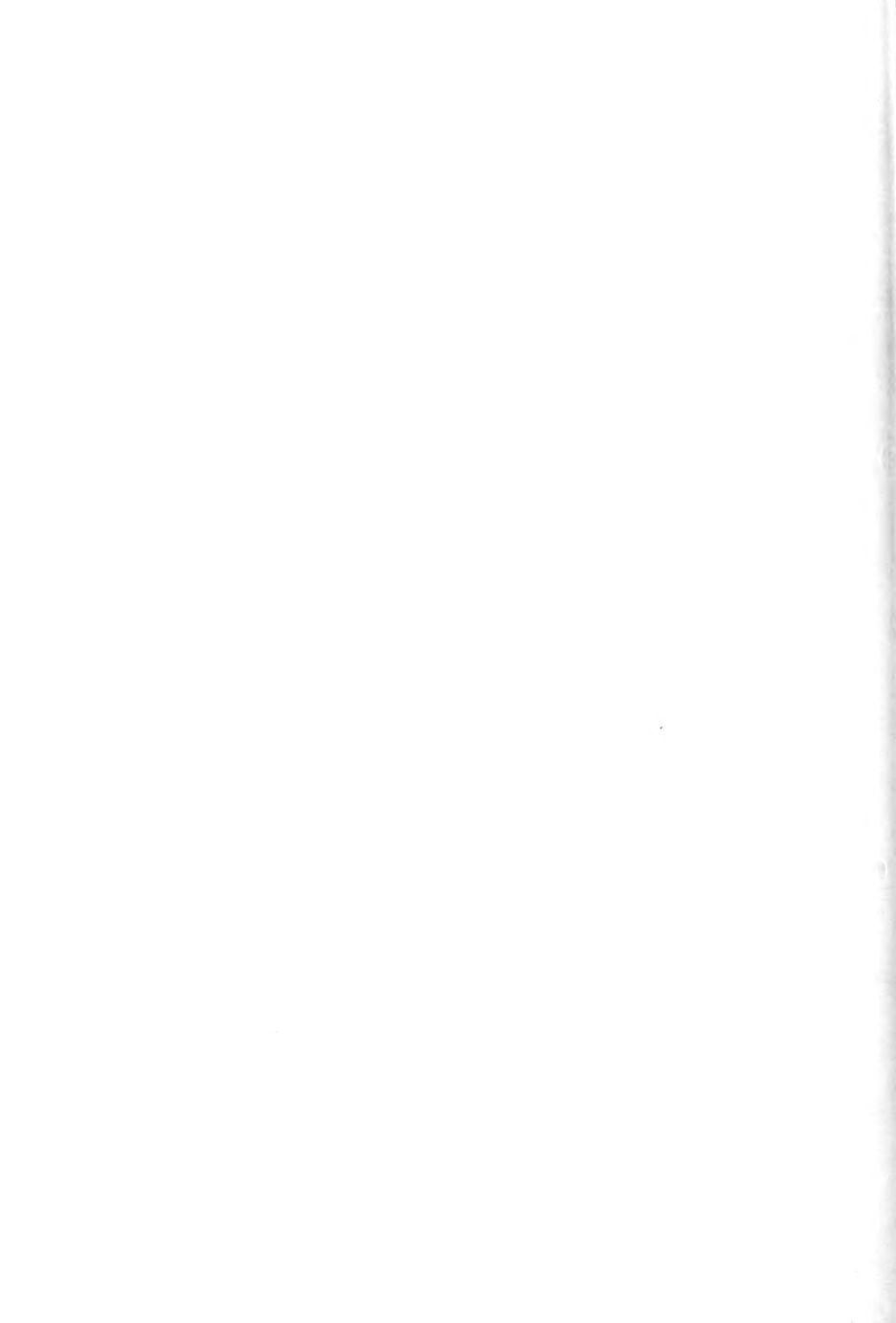
Lord Raymond: "As to the words, seeing that they were sworn to, and stand in the special verdict, I am sorry to say your denial can avail you nothing; and, we sitting here only to declare the law, you must apply elsewhere for mercy."

Mr. Justice Fortescue, the senior Puisne Judge,

1. 2 Lord Raymond, 1500.



SIR ROBERT WALPOLE.



pronounced sentence of death. Before the day fixed for the execution, came news of the death of George I. at Osnaburgh, and great interest was made with the new sovereign to begin his reign with an act of grace by pardoning Major Oneby; but George II. declared that, "the Judges having unanimously adjudged the prisoner guilty of murder, the law should take its course." Nevertheless, Major Oneby disappointed the executioner by opening an artery in his arm, so that he bled to death, the night before the day when he was to be hanged at Tyburn,¹ and he was buried in a highway with a stake driven through his body. Although he had been a gallant soldier, he was a man of very bad moral character, having lived, since his regiment was reduced at the Peace of Utrecht,² as a professional gamester, and having before killed several antagonists in duels brought on by his extreme arrogance.³

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Oneby's
Case,
continued.

The next trial for murder which I have to mention arose out of an address to the public by THOMSON,⁴ in

A.D. 1730.

1. One contemporaneous account says: "About seven in the morning he said faintly to his footman, who came into the room, 'Who is that, Philip?' A gentleman, coming to his bedside soon after, called 'Major! Major!' but, hearing no answer, drew open the curtains and found him weltering in his blood and just expiring. Mr. Green, a neighboring surgeon, was instantly sent for; but before he came the major was dead. He had made so deep a wound in his wrist with a penknife that he bled to death."

2. The Peace of Utrecht was concluded in 1713, between France, England, and the Dutch. The first stipulation of this famous treaty was that Philip renounce all claim to the throne of France. Great Britain gained the French colony of Acadia or Nova Scotia, established her right to Hudson's Bay and Newfoundland, and retained Gibraltar and the islands of Minorca and St. Christopher. The French King acknowledged Anne as Queen of Great Britain, guaranteed the succession of the house of Hanover, and engaged to make the Pretender withdraw from the French dominions—*Durivage's Cyclopædia of History*.

3. 17 Str. Tr. 30-74; 2 Str. 766; 2 Ld. Raym. 1485; 1 Burr. 178; Select Trials at the Old Bailey, ii. 153.

4. James Thomson (1700-1749), an eminent Scotch poet. The son of a clergyman, he was educated at Jedburgh, and afterwards at Edinburgh, with a view to the ministry in the Church of Scotland, which

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XXVI.
Liability
of a jailer
for murder
by neglect.

his WINTER, in favor of the miserable victims then confined in our jails. This was caused by the death of a prisoner in the Fleet¹ of the name of *Arne*, who had been confined for debt, and had expired under circumstances the most heartrending. The poet, after a compliment to the humanity of some humane individuals who, "touched with human woe," had searched "into the horrors of the gloomy jail," thus proceeds:

profession he declined. Having written his poem of "Winter," he repaired to London, where, according to Dr. Johnson, he wandered about "with the gaping curiosity of a newcomer; his attention upon everything rather than upon his pocket." In consequence he lost his handkerchief and letters of recommendation. After experiencing many of the sharp stings of poverty, he obtained a publisher for his "Winter," which, however, lay unnoticed for a considerable time. Afterwards, its great merit becoming appreciated, Thomson was brought into notice and popularity. He next produced his "Summer," "Spring," and "Autumn," and a "Poem sacred to the Memory of Sir Isaac Newton." His fame rests upon the poems of "The Seasons," to which even Dr. Johnson has borne the testimony of approbation.—*Bacon's Biog. Dict.*

1. It was in the prison of the Fleet that poor old Bishop Hooper was imprisoned (1555) before he was sent to be burnt at Gloucester, his bed being "a little pad of straw, with a rotten covering," and here, to use his own words, he "moaned, called, and cried for help" in his desperate sickness, but the warden charged that none of his men should help him, saying, "Let him alone, it were a good riddance of him." Here Prynne was imprisoned for a denunciation of actresses, which was supposed to reflect upon Queen Henrietta Maria, who had lately been indulging in private theatricals at Somerset House, was condemned to pay a fine of 10,000*l.*, to be burned in the forehead, slit in the nose, and to have his ears cut off. Hence, six years later, for reprinting one of Prynne's books, "free-born John Lilburne" was whipped to Westminster, and then brought back to be imprisoned, till he was triumphantly released by the Long Parliament. The cruelties which were discovered to have been practised in the Fleet led, in 1726, to the trial of his jailer, Bambridge, for murder, when horrors were disclosed which appalled all who heard of them. Bambridge was found to have frequently beguiled unwary and innocent persons to the prison gate-house, and then seized and manacled them without any authority whatever, and kept them there until he had extorted a ransom. In several cases the prisoners were tortured, in others they were left for so many days without food that they died from inanition, in others Bambridge having ordered his men to stab them with their bayonets, they perished from festering wounds. Hogarth first rose to celebrity by his picture of the Fleet Prison Committee.—*Hare's Walks in London*, vol. i. p. 120.

... "Where sickness pines, where thirst and hunger burn,
 And poor misfortune feels the lash of vice,
 O great design ! it executed well,
 With patient care, and wisdom-temper'd zeal,
 Ye sons of mercy ! yet resume the search ;
 Drag forth the legal monsters into light,
 Wrench from their hands oppression's iron rod,
 And bid the cruel feel the pains they give."

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In consequence, the affair was taken up by the House of Commons, who, after an investigation by a select committee, addressed the Crown, praying that John Huggins, the warden, and James Barnes, the deputy warden, of the Fleet, should be prosecuted by the Attorney General for the murder of Edward Arne.

The trial came on at the Old Bailey before Mr. Justice Page, when the jury returned a special verdict, finding "that while Huggins was warden, and Barnes deputy warden, of the Fleet, Arne was committed to that prison ; that Barnes confined him in a cold, damp, unwholesome cell over the common sewer, knowing the same to be dangerous to life, and kept him there forty days, *absque solamine ignis, necnon sine aliquâ matula, scaphis, vel aliquo alio hujusmodi utensili* ;¹ that Arne died from this imprisonment ; and that during his detention in the cell Huggins was once present, saw him under the duress of the said imprisonment, and turned away without doing anything to relieve him." After the special verdict had been twice argued before the Judges, Lord Raymond delivered judgment :

Raymond's
 judgment.

"In this case two questions arise : 1. What crime the facts found upon Barnes in the special verdict will amount to ? 2. Whether the prisoner Huggins is guilty of the same offence with Barnes ? As to the first question, it is very plain that the facts found upon Barnes do amount to murder in him. Murder may be committed without any stroke. The law has not confined the offence to any particular circumstances or manner of killing ;

1. ["Removed from the comfort of a fire, and also without any dish, vessel, or any other utensil of this sort."] All indictments and special verdicts were still in Latin.

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XXVI.
Raymond's
judgment,
continued.

there are as many ways to commit murder as to destroy men. Murder is where a man kills another of malice, so he dies within a year and a day; and malice may be either expressed or implied. Upon the facts found there is plain malice arising in construction of law. If a prisoner by duress of the jailer comes to an untimely end, it is murder, without any actual strokes or wounds. The law implies malice in such a case, because the jailer acts knowingly in breach of his duty. A prisoner is not to be punished in jail, but to be kept safely. The nature of the act is such as that it must apparently do harm. It is also cruel as it is committed upon a person who cannot help himself. So the charge of murder against Barnes is fully established. 3. The next question is, whether Huggins be guilty of the same offence; and the Judges are unanimously of opinion that upon the facts found he is neither guilty of murder nor of manslaughter. As warden, he shall answer for the acts of his deputy civilly, but not criminally. It nowhere appears in the special verdict, that he ever commanded or directed, or consented to, this duress of imprisonment which was the cause of Arne's death. The verdict finds that once the prisoner Huggins was present, and saw Arne *under the duress of the imprisonment, and turned away*; ¹ but it by no means follows that he knew the man to be under this duress. We are told by the counsel for the Crown that if he saw the man under this duress he must know it, and it was his duty to deliver him. But we cannot take things by inference in this manner. The seeing him does not imply a knowledge of the several facts which make the duress, which consists of several ingredients and circumstances not to be discovered upon sight. If the evidence would have warranted it, the jury should have found that he knew and that he consented to what Barnes had done. *Malice* is an inference of law for the Court, but *consent* is a fact to be found by the jury. Then if the verdict be defective, we are pressed for a new trial; but, without determining the question whether after a special verdict in felony there may be a *venire de novo*, we are all of opinion that this verdict is not so uncertain as that judgment cannot be given upon it. The facts found are positively found; but, taken together, are not sufficient to make Huggins guilty of murder, and therefore he must be adjudged NOT GUILTY." ²

1. "Sub duritie imprisonmenti predicti et se avertit."

2. 17 St. Tr. 297-382; 2 Lord Raym. 1574.

There is one other case of the same kind before Lord Raymond, which is worthy of notice. In the popular rage then prevailing against jailers, Thomas Bambridge, a former warden of the Fleet, was indicted for the murder of Robert Castell, on the ground that he had confined him in a house in which there was a man lying ill of the smallpox, a disease which Castell had not had, and which he caught and died of. The indictment coming on for trial at the Old Bailey before Mr. Justice Page, Bambridge was easily acquitted on the evidence for the prosecution; but, instigated by a mobbish confederation, who subscribed large sums of money to gain their object, Mrs. Castell, the widow, sued out an "appeal of murder" against Bambridge, and likewise against Corbett, his deputy, who, in case of need, was to have been called as his principal witness. The appellees, instead of waging battle and defending themselves by their champions in the listed field, as they might have done, put themselves upon the country, and they were tried by Lord Raymond and a jury of London merchants. The prosecution was conducted with great zeal by Mr. Reeve,¹

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A.D. 1730.
Prosecu-
tion of
Bambridge
for murder.

1. Thomas Reeve, frequently miscalled Reeves, was the son of Richard Reeve, Esq., of New Windsor, who erected four almshouses in the parish. Admitted first a member of the Inner Temple, he transferred himself to the Middle Temple, and was called to the bar by the latter society in 1713. He had such success that he was made King's Counsel so early as 1718, and soon afterwards Attorney General for the Duchy of Lancaster. He became a Bencher of the Middle Temple in 1720, and Reader in 1722. In the latter year he was counsel for the Crown in support of the bill of attainder against Bishop Atterbury and the other parties implicated in the same conspiracy; and in 1730 he most ably advocated the cause of the widow of Robert Castell in the appeal of murder against Bambridge, the warden of the Fleet. In April, 1733, he was constituted a Judge of the Common Pleas, and knighted; and after sitting there for nearly three years he was advanced to the head of the court in January, 1736. His enjoyment of this post was limited to a single year, as on Jan. 13, 1737, he died. Learned himself, he was an encourager of the aspirants to learning; and that he was a favorite among the literary men of the day is apparent from numerous printed and manuscript verses written in his laudation.—*Foss's Lives of the Judges.*

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afterwards Chief Justice of the Common Pleas, and Mr. Lee, afterwards Chief Justice of the King's Bench; and they contrived, by dexterous management, to make out a sort of *prima facie* case. The appellees were ably defended by Sergeant Darnell and Sergeant Eyre, who both addressed the jury in their favor in long and eloquent speeches,¹ and, by calling witnesses, they made out a clear defence. Lord Raymond, in summing up the case to the jury, said,—

Raymond's
summing
up.

“This appeal by Mary Castell, for the death of her husband, is grounded on the doctrine that as the law has particular guards and privileges in justifying the right of a jailer in detaining prisoners in safe custody, so on the other hand he must treat them humanely and put them into such places as do not prejudice their limbs and lives; for if they are put into such places and they die, this is murder. If a jailer brought bodies that were infectious into a room, so that a prisoner should catch a mortal distemper, or put him into irons by which he should die, the legal result is the same. Likewise, if a jailer will take persons that have not a distemper, and carry them to a room against their consent after notice given to him that such a distemper is there, it is at his peril. In the present case, gentlemen, these circumstances must be concurrent, that the deceased was carried to the house against his will; that the distemper was in the house; that the appellees had notice of the distemper being there; that, notwithstanding, he was carried and kept there, and that thereby he caught the distemper which was the occasion of his death.”

He then went over the whole of the evidence, and showed that, with respect to Corbett, there was nothing to prove any knowledge of the distemper being in the house; and, with respect to Bambridge, that Castell had gone with him to the house voluntarily, and had made no complaint while there till he caught the infection. The jury found both appellees

1. It was only upon indictments in the name of the King that, at common law, prisoners were deprived of the assistance of counsel in capital cases. If the proceeding was by appeal, the trial was conducted as if it had been a civil action.

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Raymond's
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"This appeal by Mary, for the death of her husband, is grounded on the death of her husband. The law has particular guards and privileges in respect of a jailer in detaining prisoners in safe custody. On the one hand he must treat them humanely, and not put them in such places as do not prejudice their lives; and on the other, if they are put into such places and they die, this is murder. If a jailer brought bodies that were infectious into a house, and a prisoner should catch a mortal distemper, or any other disease by which he should die, the legal result would be murder. Likewise, if a jailer will take persons that have not been committed, and carry them to a room against their consent, and give to him that such a distemper is there, it is murder. In the present case, gentlemen, these circumstances were concurrent, that the deceased was carried to the house against his will; that the distemper was in the house; that the jailers had notice of the distemper being there, and yet, without doing, he was carried and kept there, and that he died, caught the distemper which was the occasion of his death.

He then went over the whole of the evidence, and showed that, with respect to Corbett, there was nothing to prove any knowledge of the distemper being in the house; and, with respect to Bambridge, that Castell had voluntarily gone to the house voluntarily, and had made no complaint while there till he caught the infection. The jury found both appellees

1. It was only upon indictments in the name of the King that, at common law, prisoners were debarred by assistance of counsel in capital cases. In the proceeding now by appeal, the trial was conducted as if it had been a civil action.



WILLIAM EARL OF MANSFIELD.



NOT GUILTY; but, from the popular prejudice against them, they had been in considerable jeopardy.¹

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I have now to present to the reader Lord Raymond sitting as judge on the trial of an information for libel. His authority has been mainly relied upon to support the doctrine that, in such a proceeding, the truth of the assertion of fact alleged to be libellous is wholly immaterial, and that libel or no libel is a pure question of law for the Court. The leading opposition journal of that day was the CRAFTSMAN, to which Pulteney,² Bolingbroke,³ and the other antagonists of

Lord
Raymond
on the law
of libel.

1. 17 St. Tr. 383-462; 2 Str. 854. Notwithstanding this flagrant abuse of the proceeding of appeal of murder, it continued till the year 1819, when it was abolished upon Abraham Thornton throwing down his gauntlet on the floor of the Court of King's Bench, and demanding trial by battle, *ut vidi*. See 59 Geo. III. c. 46. See *post*, chap. xlix.

2. William Pulteney, Earl of Bath, an English statesman, became a member of the House of Commons early in life, and at the prosecution of Walpole in 1712 defended him with great eloquence. When George I. ascended the throne he was appointed Secretary at War under Walpole; but he subsequently became a severe and constant antagonist of that minister, until at length he succeeded in depriving Sir Robert of his place; after which he was created Earl of Bath, and was admitted of the Privy Council. He had been a popular idol up to this time; but then, in the words of Chesterfield, sunk "into insignificance and an earldom." Born 1682; died 1764.—*Beeton's Biog. Diet.*

3. Henry St. John, Viscount Bolingbroke (1678-1751), a distinguished political writer and statesman, who in 1701 entered Parliament as member for Wotton-Basset, and in 1704 became Secretary at War. In 1708 he resigned, but in 1710 he was again one of the ministry. For the next four years he assisted in governing the country, and by the inglorious Treaty of Utrecht, in April, 1713, brought the war with France to a close. In 1712 he was created Viscount Bolingbroke; but the death of Queen Anne in 1714 was a fatal blow to Bolingbroke, who had quarrelled with his old friend Harley, the Earl of Oxford, and who was endeavoring to form a new cabinet. The death of the Queen disarranged all Bolingbroke's schemes, and in the following year he was compelled to make his escape to France in disguise, to evade the vengeance of his enemies. On the accession of George I. he was impeached by Walpole at the bar of the House of Lords, and, not appearing to take his trial, was attainted by act of Parliament. Meanwhile he had entered the service of Charles Stuart, the Pretender, who appointed him his Prime Minister, but who after his return from Scotland dismissed him. In 1723 he was permitted to return to England, but was not readmitted to the House of Lords. This excited his animosity, and he began to write against the ministry with considerable effect, and finally succeeded in overthrowing

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XXVI.
Lord Ray-
mond on
the law of
libel, con-
tinued.

A D. 1731.

Sir Robert Walpole, were constant contributors. In No. 235, dated 2d of January, 1730-31, there appeared a letter which purported to come from a correspondent at the Hague, but which in reality was written by Bolingbroke in London, most bitterly inveighing against the foreign policy of the Government, and imputing very disreputable conduct to ministers in their negotiations with foreign states. This was particularly obnoxious to King George II., who was then engaged in deep political intrigues, with the view of adding a few acres to the electorate of Hanover; and, to please him, Sir Philip Yorke, the Attorney General, prosecuted Francklin, the printer and publisher, who was a bookseller in Fleet Street.¹ "At the trial, a vast

Sir Robert Walpole. In 1735 he once more withdrew to France, where he resided until the death of his father, which event enabled him to take possession of the family estates at Battersea. Here he passed the remainder of his days, employing his pen upon other subjects besides such as had political tendencies.—*Beeton's Eng. Dict.*

1. On passing the site of Temple Bar we are in the City of London. It separates the city from the shire, in allusion to which "Shire Lane" (destroyed by the New Law Courts) was the nearest artery on its north-western side. We enter *Fleet Street*, which, like Fleet Market and Fleet Ditch, takes its name from the once rapid and clear, but now fearfully polluted, river Fleet, which has its source far away in the breezy heights of Hampstead, and flows through the valley where Farringdon Street now is, in which it once turned the mills which are still commemorated in Turnmill Street. Originally (1215) it was called the "River of Wells," being fed by the clear springs now known as Sadler's Wells, Bagnigge Wells, and the Clerks' Well or Clerkenwell; and it was navigable for a short distance. The river was ruined as the town extended westwards. Ben Jonson graphically describes in verse the horrors to which the increasing traffic had subjected the still open Fleet in his day, and Gay, Swift, and Pope also denounce them; but in 1765 the stream was arched over, and since then has sunk to the level of being recognized as the most important sewer—the Cloaca Maxima—of London. Having always been considered as the chief approach to the city, Fleet Street is especially connected with its ancient pageants. All the coronation processions passed through it, on their way from the Tower to Westminster; but perhaps the most extraordinary sight it ever witnessed was in 1448, when Eleanor Cobham, Duchess of Gloucester, aunt of King Henry VI., was forced to walk bareheaded through it to St. Paul's with a lighted taper in her hand, in penance for having made a wax figure of the young King and melted it before a slow fire, praying that his life might melt with the wax.—*Harc's Walks in London*, vol. i. p. 101.

crowd of spectators of all ranks and conditions were assembled, and the court was crowded with noblemen and gentlemen. It was remarkable that Mr. Pulteney, presumed to be one of the patrons of the prosecuted paper, was loudly huzzaed by the populace in Westminster Hall, which shows the fondness of the people of England for the freedom of the press."¹

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the law of
libel, con-
tinued.

The Attorney General contented himself with proving a preliminary averment in the information respecting the existence of a treaty, and the purchase in the defendant's shop of a copy of the newspaper containing the Hague letter. Mr. Fazakerley, on the other side, contended that the case for the Crown was defective, because no evidence had been given to falsify the statements in the letter, which he could prove were true, and that, in reality, the jury ought to find that the letter was no libel, as it did not in any degree reflect upon the King, and only made fair observations on the conduct of his ministers:

Lord Raymond, C. J.: "My opinion is, that it is not material whether the facts charged in a libel be true or false, if the prosecution is by information or indictment. There are legal remedies provided for every one who is injured, without scandalizing others. Above all, the character of a magistrate, minister of state, or other public person, is to be protected. The law reckons it a greater offence when the libel is pointed at persons in a public capacity, as it is a reproach to the King to employ corrupt and incapable persons. Such charges tend to sow sedition and to disturb the peace of the kingdom. Therefore I shall allow no evidence to prove that the matters charged in the libel are true. If you think I am wrong, apply to the Court, and they will do you justice." In summing up he said, "There are here three things to be considered, two of them being for the jury, and the third for the Court. 1. Did the defendant, Mr. Francklin, publish this *CRAFTSMAN* or not? 2. Do the expressions in the letter allude to the King and his ministers according to the innuendoes? These are matters of fact for your consideration of which

1. Boyer's Political State of Europe, 1731.

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you are the proper judges, and if you think in the affirmative on both questions, you will find a verdict of *guilty*. There is a third question—whether these defamatory expressions amount to a libel or not? This belongs to the office of the Court, for it is matter of law, of which the Court are the only proper judges. We are not to invade each other's provinces, as has been suggested of late by those who ought to have known better."

The jury having found the defendant guilty of publishing the libel, he was sentenced to a year's imprisonment and to pay a fine of 100*l*.¹

A. D. 1725—
1731.
Lord Ray-
mond's
nisi prius
decisions.

Lord Raymond's authority as a judge was so high that his decisions at *nisi prius*, when sitting all alone trying causes by jury, were reported, and settle many important points which, till then, were doubtful; as, that "a husband is not liable to be sued for necessaries supplied to his wife if she has eloped from him with a paramour;"² that, "if goods which are not necessities are supplied to a minor, he is bound by a promise made after coming of age to pay for them;"³ that, "if a man render services for which he would otherwise be entitled to be paid, he cannot maintain an action for them if he rendered them to ingratiate himself in hopes of a legacy, although the party who receives them dies without leaving him anything;"⁴ and that, "notwithstanding the old maxim, *pater est quem nuptie demonstrant*, the child of a married woman may be proved to be illegitimate by evidence that her husband could not have been the father of the child, although he was living within the four seas."⁵

1. 17 St. Tr. 625-676. He was more lucky another time, when his acquittal gave rise to Pulterey's ballad—"Sir Philip well knows that his innuendoes," etc. (See *post*, in Life of Lord Mansfield.) Looking to these exploded heresies, which then passed for gospel, it is curious to conjecture whether any, and which, of the doctrines which are now reverentially cherished will be anathematized by posterity.

2. *Morris v. Martin*, 1 Str. 647; *Manwaring v. Sands*, 2 Str. 706.

3. *Southerton v. Whitlock*, 2 Str. 690.

4. *Osborn v. Guy's Hospital*, 2 Str. 728.

5. *Pendrell v. Pendrell*, 2 Str. 924.

Lord Raymond was sworn a member of the Privy Council when made Chief of the King's Bench; and, as often as George I. or George II. went abroad, he was constituted one of the Lords Justices for the government of the kingdom in the King's absence: but in these capacities he confined himself merely to going through formalities. He would take no active part in politics; and, although he steadily voted for Sir Robert Walpole's government, he never spoke upon any party question.

The only debate in which I can find that he ever mixed in the House of Lords was on the bill enacting that all legal proceedings should be conducted in the English language. I am sorry to say that he opposed it as a dangerous innovation, thinking that barbarous Latin should still be used to express a criminal charge in an indictment, the meaning of it being quite unintelligible to the party accused, whether illiterate or a good classical scholar. Lord Raymond ridiculed the supposed necessity for records being in the vernacular tongue, by observing that, "upon this principle, in an action to be tried at Pembroke or Caernarvon, the declaration and plea ought to be in Welsh." The Duke of Argyle¹ courteously answered, that "he was glad to perceive that the noble and learned lord, perhaps as wise and learned as any that ever sat in that

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His ab-
sence
from
politics.

A.D. 1731.
His oppo-
sition to
the bill for
conducting
law pro-
ceedings in
English.

1. John Campbell, second Duke of Argyle (1678-1743), an able commander, was the son of Archibald, first Duke of Argyle. He inherited his father's title in 1703, and in 1705 was created an English peer, as Baron Chatham and Earl of Greenwich. Between 1705 and 1710 he served with distinction at the battles of Ramillies, Oudenarde, and Malplaquet, and was promoted to the rank of lieutenant-general. On the accession of George I., Argyle was appointed commander-in-chief of all the forces in Scotland. He rendered important services in suppressing the rebellion of 1715, and opposed with success at Dunblane a superior force of the Pretender under the Earl of Mar. He changed sides several times in politics, and was accused of trafficking or intriguing with the Jacobites. He died, without male issue, in 1743, when the dukedom of Argyle passed to his brother Archibald.—*Thomas' Biog. Dict.*

CHAP. XXVI. House, had nothing to bring forward against the bill but a joke."¹

I have been able to discover very little of Lord Raymond in private life. He seems to have associated only with lawyers. He resided chiefly in Red Lion Square, then the seat of the legal aristocracy;² and he had a country-house in Hertfordshire, where he bought a large estate. After a short illness, he died, in Red Lion Square, on the 15th of April, 1733, in the 61st year of his age; and he was buried at Abbots Langley.

His death,
April 15,
1733.

His monu-
ment.

At the east end of the parish church is to be seen a handsome marble monument of Lord Chief Justice Raymond, who is represented in a sitting posture, leaning upon a pile of books: in his right hand he holds a scroll, upon which is written "*Magna Charta*;" his left is stretched out to receive a coronet, presented to him by a child; on his right hand sits a lady, in a mournful posture, holding over him a medallion, upon which is the head of a youth, carved in relief.

1. 8 Parl. Hist. 861. In palliation of Lord Raymond's prejudice in favor of ancient absurdities, I may observe that I have heard judges in my own time lament the change then introduced, on the ground that, although it might be material for the parties, both in civil and criminal proceedings, to have some notion of what is going on, the use of the law Latin prevented the attorneys' clerks from being so illiterate as they have since become. I may likewise mention the ruling of a Welsh judge about thirty years ago, on a trial for murder, "that the indictment and the evidence must not be interpreted into Welsh for the information of the prisoner, as that would be contrary to the statute of George II. which requires all proceedings to be carried on in the English language."

2. Such a change had been produced by the lapse of a century, that, to denote the inferiority of the class now to be found there, I have heard the comparison, "as proud as a judge's wife at a rout in Red Lion Square."—"The next street, Dean Street, leads into *Red Lion Square*, so called from the Red Lion Inn, whither the bodies of Cromwell, Ireton, and Bradshaw were brought when exhumed from Westminster Abbey, to be dragged the next day on sledges to Tyburn. In No. 13 lived and died Jonas Hanway, the traveller, who was the first person in England who carried an umbrella, and he only died in 1786!"—*Hare's Walks in London*.

Under the shield containing his arms there is the following inscription :

"OBLATOS HONORES FILII GRATIÂ ACCIPIT JUDEX AQUISSIMUS.
M. S.

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His epi-
taph.

Honoratissimi viri Roberti Raymond,
Baronis de Abbot's Langley ;
Cujus meritis raro exemplo respondit Fortuna ;
honesto enim loco natus,
literisque humanioribus primâ ætate excultus,
universam juris scientiam, cui sese addixerat,
tantâ ingenii facilitate complexus est,
ut inter præcipuos causarum patronos
brevis tempore haberetur ;
in quo munere exequendo,
cûm pari fide solertiâ atque gravitate
indies magis magisque inclaruisset,
ad diversos juris honores gradatim ascendit ;
donec augustissimorum principum Georgii I. et II. jussu
Capitalis Angliæ Justiciarius constitutus,
mox, ut uberiorem virtutis suæ fructum caperet,
in amplissimum procerum ordinem
Cooptatus est."

He left behind him one son, by his wife, who was a daughter of Sir Edward Northey, Attorney General to Charles II.

The second Lord Raymond was not very distinguished, and I do not find him noticed except in the proceedings against Astley and Cave² for printing an

1. "A most equitable Judge receives the honor which the gratitude of his son bestows upon him. Sacred to the memory of that venerated man, Robert Raymond, Baron of Abbot's Langley, to whose extraordinary genius Fortune responded. Born of respectable family, from early youth devoted to literature and philanthropy, such was his ability that he gained a wide knowledge of law, to which he had applied himself, and in a short time was ranked among eminent advocates of cases. He performed every duty with faithfulness, skill, and dignity. He became more and more famous, and ascended step by step to the different honors of the law, until, by the command of their most revered Majesties, George I. and George II., he was appointed Chief Justice of England. Soon after, that he might enjoy still more the fruit of his excellence, he was admitted among the most distinguished order of Nobles."

2. Edward Cave, a printer, to whom the literary world is under great obligations, was born at Newton, Warwickshire, February 29, 1691. He was educated at Rugby School, on leaving which he became clerk to a collector in the Excise, but soon left that situation, and came to London, where he put himself apprentice to a printer. On the expiration of his

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account of Lord Lovat's¹ trial—when he was chairman of the committee to whom the matter was referred, and moved their commitment. He was married to a daughter of Lord Viscount Blundell, of the kingdom of Ireland; but, dying without issue, in the year 1756, the title became extinct.²

His Re-
ports.

The Chief Justice's REPORTS³ are the great glory of the family, and have obtained his introduction into Horace Walpole's⁴ Catalogue of Royal and Noble

time he married and obtained a place in the Post-office, though he still continued at intervals to follow his business. He corrected the "Gradus ad Parnassum," and wrote for the newspapers. On being dismissed from his place for resisting abuses in the privilege of franking, he set up "The Gentleman's Magazine," which had great success and will ever reflect honor on its projector. Cave died January 10, 1754.—*Cooper's Biog. Dict.*

1. Simon Fraser, Lord Lovat, a Scottish Jacobite conspirator, born near Inverness about 1666. At the death of Lord Lovat, who was chief of the Fraser clan, Simon Fraser made unsuccessful attempts to obtain the title and estates. To evade the penalty of some crime, he passed over to France about 1700, and turned a Roman Catholic. Having entered the service of the Pretender, he was sent to Scotland in 1702 to incite the Highlanders to rebellion; but he betrayed his trust, and acted the part of informer against the Jacobites. For this offence he was confined in the Bastille several years. In 1715 Fraser fought against the cause of the Stuarts at Inverness, and was rewarded with the estates of the Frasers and the title of Lord Lovat. In the rebellion of 1745 he was detected in treasonable acts against King George, for which he was executed in London in 1747.—*Thomas' Biog. Dict.*

2. It is a curious fact that Lord Kenyon is the first ennobled Chief Justice of the King's Bench of whom there is a descendant now a member of the House of Lords.

3. These Reports were first printed in 1743, and a second edition came out in 1745. The last edition, by Mr. Justice Bayley, with valuable notes, appeared in 1790. From the multiplicity of modern Reports, the old ones will probably never be reprinted.

4. Horace Walpole (1717-97), Earl of Orford, an eminent English author, and youngest son of Sir Robert Walpole. He was educated at Eton and at King's College, Cambridge, where he wrote some verses on Henry VI., the founder. In 1741 Walpole was elected to Parliament; but, although he retained his seat during twenty-eight years, he distinguished himself in debate upon only two occasions,—once in defence of his father's late administration, and again in favor of the unfortunate Admiral Byng. He retired from Parliament in 1768, and led a life of literary ease at his villa of Strawberry Hill, at Twickenham, where he formed a collection of books, manuscripts, pictures, and other works of art or of curiosity, and set up a printing-press, from which proceeded



HENRY ST. JOHN, VISCOUNT BOLINGBROKE.



Authors, who describes him as "one of those many eminent men who have risen to the peerage from the profession of the law."¹

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The warmest eulogium pronounced upon Lord Raymond is in the dedication to him of the Reports of Chief Baron Comyns.² The eulogist, after describing the splendor of his reputation as supreme magistrate of the common law, adds—"The difficulty of succeeding a person so truly eminent as your Lordship's noble and learned predecessor was too apparent to all the world; but I may venture to add, with as much truth, that his Majesty (whose great regard and paternal affection for his subjects can appear in nothing more than so worthily filling the seats of justice) never gratified them in a more sensible manner than when he conferred that honor on your Lordship; for, however excellent great abilities and profound science are in themselves, however necessary to persons intrusted with the public sword of justice, they only become truly valuable to the rest of mankind when governed and directed by the rules of honor, virtue, and integrity."³

Panegyric
upon him.

On the death of Lord Raymond, the office of Chief Justice of the King's Bench remained vacant for sev-

many elegant works by himself and others. On the death of his nephew in 1791, he succeeded to the title of Earl of Orford. His best works were his "Letters." Sir Walter Scott speaks of him as "the best letter-writer in the English language."—*Bacon's Biog. Dict.*

1. Works, vol. i. p. 445.

2. Sir John Comyns was a native of London, and received his education at Queen's College, Cambridge. He was made a Baron of the Exchequer and knighted 1726; Justice of the Common Pleas February 5, 1735-36; Chief Baron of the Exchequer 1738; and died November 13, 1740. His famous "Digest of the Laws of England" was first printed between 1762 and 1767, in five folio volumes, to which a continuation, in one volume, was added in 1776.—*Cooper's Biog. Dict.*

3. See Chalmers's Biographical Dictionary. "Lord Raymond;" Kent's Commentaries, 453.

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HARD-
WICKE,
Chief Jus-
tice of the
King's
Bench.

eral months. About the same time, Lord King, from severe indisposition, was obliged to resign the Great Seal, and the arrangements which, in consequence, became necessary caused great perplexity. At last it was settled that Mr. Talbot,¹ the Solicitor General, should be Lord Chancellor; and, in Michaelmas Term, SIR PHILIP YORKE, the Attorney, took his seat as Chief Justice of the King's Bench.

I ought now to describe his wonderful course, from the time when being an attorney's *gratis* clerk he was sent to buy cabbages at the greengrocer's and oysters at the fishmonger's for an imperious mistress, till he became Lord High Chancellor, an earl, and the renowned framer of our equitable code; but I have already, to the best of my ability, narrated his adventures, and drawn his character; and, upon reflection, I see no reason to retract or to qualify any of the praise or of the censure which I had ventured to mete out to him.²

It was thought that he would end his days as a common-law judge, like Hale, Holt, and many of his most illustrious predecessors; but, after he had presided in the King's Bench little more than two years, Lord Talbot³ died suddenly, while still a young man; and Lord Hardwicke, being transferred to the wool-sack, fulfilled his illustrious destiny.

Feb. 1737.

1. See Lives of the Lord Chancellors.

2. Lives of the Chancellors, ch. cxxix.-cxxxvii. Since the first edition of my book, a Life of Lord Hardwicke, by Mr. Harris, has been published, in which complaint is made of me as often as I have ventured to doubt the propriety of anything that our hero ever did, said, wrote, or thought. But the "faultless monster" whom this author describes bears a very partial resemblance to Lord Hardwicke.

3. Charles, Lord Talbot, an eminent English jurist, was the son of William Talbot, Bishop of Durham. He practised law with great success, and acquired a high reputation as an eloquent debater in Parliament. In 1733 he became Lord Chancellor of England, and was created Baron Talbot. He was an excellent lawyer, and a man of high virtue and public integrity. Born 1684; died 1737.—*Becton's Biog. Dict.*

Much difficulty was experienced in fixing upon a successor to him in the Court of King's Bench. From the earliest times, in each of the superior common-law courts, a CHIEF had been constituted, with *Puisnics* under him; for, with a perfect equality of rank among all the judges, a constant struggle would be carried on among them for ascendancy, the bar could not be duly kept in order, and the business would be thrown into confusion. But the full advantage of this arrangement can only be obtained when the Chief is superior to his brethren in talents and reputation. The condition of the court is very unseemly and inconvenient when the collar of S.S. is worn by one who feels that he does not deserve it, or who is considered by others inferior in authority to those who sit undecorated by his side.

Lord Hardwicke, during the Chancellorship of Lord Talbot, having been eclipsed in the House of Lords by the superior brilliancy of that extraordinary man, was supposed to be anxious to avoid the annoyance of having another law lord as a rival. Some applied to him the magniloquent comparison that he would

"Bear, like the Turk, no brother near his throne ;"

and others, in homely but expressive language, said "he was resolved to *rule the roast*."¹ He therefore cast his mantle on SIR WILLIAM LEE, who had been one of his *Puisnics*, who was of decent character and respectable qualifications, who had no pretensions to a peerage, and who could never in any way be formidable to a chancellor. Although this selection was suspected to proceed from selfish motives, there is some doubt whether, from the peculiar state of the

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Difficulty
in filling up
the office
on his pro-
motion to
be Chan-
cellor.

His resolu-
tion to *rule
the roast*.

SIR WILL-
IAM LEE,
Chief Jus-
tice of the
King's
Bench.

1. Lond. Mag. 1737. He actually did *rule the roast* more than twenty years, sitting during all that time the only law lord in the House of Peers.

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bar at that time, a better could have been made: for there were serious objections to Willes, the Attorney General, on account of his profligate private life; and Ryder, the Solicitor General, had as yet very little weight or legal reputation. The honors of the profession may be considered a lottery: or if they are supposed to be played for,—in the game there is more of luck than of skill. At times, we see a superfluity of men well qualified for high legal offices, while years roll on without a vacancy. At times, vacancies inopportunately arise when they cannot be reputably filled up. Sir William Lee had never dreamed of being more than a *Puisne*, till the hour when it was announced to him that he was CHIEF JUSTICE OF ENGLAND.

His
brother.

He and his brother Sir George, like the two Scotts, Lord Eldon¹ and Lord Stowell,² had the rare felicity

1. John Scott, Earl of Eldon (1751–1838), after passing through the University of Oxford, entered himself a student of the Middle Temple in 1773, and took his degree of Master of Arts in the following year. After patient and laborious study he rose into notice, and in 1783 was returned member of Parliament for Weobly. In 1787 he was appointed Chancellor of the bishopric and county palatine of Durham, and in the following year Solicitor General. In 1793 he was made Attorney General, and in 1799 was raised to the Chief Justiceship, with a seat in the House of Lords, as Baron Eldon. In 1801 he became Lord Chancellor, which office he finally resigned in 1827. In 1821 he had been created Viscount Encombe and Earl of Eldon.—*Beeton's Biog. Dict.*

2. William Scott, Baron Stowell, an English judge, born near Newcastle in 1745, was a brother of Lord Eldon. He was educated at Oxford, where he became Camden reader of ancient history. He passed about eighteen years at Oxford (1761–79). About 1778 he was elected a member of the famous Literary Club, and became a friend of Dr. Johnson. He was called to the bar in 1780, and practised in the ecclesiastical courts and High Court of Admiralty. He was more distinguished for learning than for oratorical talents. In 1788 he was appointed a Judge of the Consistory Court, Advocate General, and Privy Councillor. He was elected a member of Parliament in 1790, and became Judge of the High Court of Admiralty in 1798. He represented the University of Oxford in Parliament from 1801 till 1821, and constantly supported the Tory party. He was raised to the peerage, as Baron Stowell, in 1821. Lord Stowell is regarded as a high authority for ecclesiastical and international law. Died in 1836.—*Thomas's Biog. Dict.*

of presiding at the same time over the highest common-law and civil-law courts in this country; for while Sir William Lee was Chief Justice of England, Sir George Lee presided as Dean of the Arches¹ and Judge of the Prerogative Court of Canterbury. They were the sons of Sir Thomas Lee, of Hartwell, in the county of Bucks, Bart.

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William, the younger, who was born in the year of His birth. the Revolution (1688), used often to say that, "as he

1. On the right of Cheapside rises *St. Mary-le-Bow*. It was built by Wren on the site of a very ancient church described by Stow as having been the first church in the city built on arches of stone, whence in the reign of William the Conqueror it was called "St. Marie de Arcubus or Le Bow in West Cheaping; as Stratford Bridge, being the first built (by Matilde the Queen, wife to Henry I.) with arches of stone, was called Stratford-le-Bow; which names to the said church and bridge remain to this day." A staircase in the porch leads to the Norman *Crypt* which was used by Wren as a support for his church. Some of the columns have been partially walled up to strengthen the upper building, but the crypt is of great extent, and in one part the noble Norman pillars are seen in their full beauty, with the arches above, which have given the name of "Court of Arches" to the highest ecclesiastical court belonging to the Archbishop of Canterbury, which formerly met in the vestry of this church. It is the chief of a deanery of thirteen parishes, exempt from the jurisdiction of the Bishop of London: hence the title of the Dean of Arches. The bishops elect of the province of Canterbury take the oath of supremacy at this church before their consecration.—*Hare's Walks in London*, vol. i. p. 232. —The provincial jurisdiction of the archbishops was exercised in their *Provincial Courts*. The judge of the Provincial Court of Canterbury was the *Official Principal*. In the *Court of Arches*, so called because held in St. Mary-le-Bow (de *Arcubus*), the *Dean of Arches* exercised the archbishop's jurisdiction over certain peculiars, or parishes exempt from the ordinary episcopal jurisdiction. As the offices of Official Principal and Dean of Arches were usually vested in the same person, the Court and Dean of Arches came to be inexactly spoken of as if they signified the court and judge of the archbishop's provincial jurisdiction. The final appeal from this court lay, after the breach with Rome, to a body called the *High Court of Delegates* (25 Henry VIII. c. 19). By 3 and 4 Wm. IV. c. 41, the appellate jurisdiction of this court was conferred on the *Judicial Committee of the Privy Council*. The office of Official Principal, both of Canterbury and York, is now, by the Public Worship Regulation Act (37 and 38 Vict. c. 85), merged in that of a judge appointed by the archbishops, subject to the approval of her Majesty. This judge exercises the provincial jurisdiction of both archbishops as the Official Principal of the Arches Court of Canterbury and the Chancery Court of York.—*Low and Pulling's Dict. of Eng. Hist.*

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came in with King William, he was bound to be a good Whig." He might have been called "Single-joke Lee," for, although highly honorable and respectable, he was the dullest of the dull throughout the whole course of his life; and this oft-repeated pleasantry, with which he was in the habit of introducing his opinion on any controverted question of politics, was the only one which he was ever known to attempt or to relish.¹ Great astonishment was expressed by most

A.D. 1700—
1710.

Prophecy
as to the
effect of
plodding
and *perse-*
verance.

of those who knew him at college when it was announced that he was destined for the profession of the law, and predictions were uttered that he would starve in it. But an old gentleman who had been his tutor, and who knew what was in him, said, "I shall not—but you who are young may—live to see him Chief Justice of England, for to *plodding* and *perseverance* nothing is impossible." The dull and despised William Lee did plod, did persevere, and did become Chief Justice of England.

His passion
for special
pleading.

In preparing for the bar, he mainly devoted himself to special pleading, in which he took great delight. He never even had attempted to cross the "Ass's Bridge," so that he could not tell whether this would have proved an insuperable obstacle to his mathematical progress; and, though well drilled in the rules of prosody, he utterly and for ever renounced classics as soon as he had taken his bachelor's degree at Oxford. Of modern literature he had not the slightest tincture. He felt no regret that he had lost an opportunity of being presented to Dryden. Instead of writing a paper in the SPECTATOR, like his contemporary and fellow law-student, Mr. Philip Yorke, he declared that he had never got further than the second number, where he was shocked "by the description of the idle

He re-
nounces
classics and
modern
literature.

1. According to this instance, Pope's line ought to have been—

"For gentle dulness ever loves ONE joke."



CHIEF JUSTICE LEE



Templar, who read Aristotle and Longinus, who knew the argument of each of the orations of Demosthenes and Tully, but not one case in the reports of our own courts, and whose hour of business was the time of the play, when, crossing Russell Court and having his periwig powdered at the barber's, he took his place in the pit of Drury Lane Theatre,¹ exciting the ambition of the actors to please him." It cost Lee no effort of self-denial to abjure such unprofitable pursuits. As it were in the gratification of a natural instinct, he took to the *Liber Placitandi*; and, to fix it in his memory, he copied it over three times with his own hand. He luxuriated likewise in *Coke's Entries*; and in perusing *Saunders's Reports* he loved more to dwell upon the declarations, pleas, and replications, as there set out at full length, than the subsequent epigrammatic statements of the arguments and the decision which have gained to the author the title of "the Terence of Reporters." The fiction of "*giving color*," which had driven some very scrupulous pleaders from the bar, particularly charmed him; and, considering the rules of law to be founded either on the eternal fitness of things or on the revealed will of God (a question which, it appears from his Diary, he was accustomed to dispute), there was no dexterity sanctioned by these rules which he did not deem justifiable. At the same time he was an amiable, worthy man,—

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Lee an
amiable,
worthy
man.

1. The first building of this name, situated upon the same site with the present edifice, was opened in 1663. It was subsequently burnt, and was rebuilt from designs by Sir Christopher Wren. It was reopened in 1674 with a prologue and epilogue by Dryden. Many eminent actors and playwrights have at different times been connected with this theatre. It was again destroyed by fire in 1809, and the present house was opened in 1812 with a prologue by Lord Byron. This opening in 1812 is interesting from its connection with the publication of the "*Rejected Addresses*" of James and Horace Smith. The managers of the theatre having advertised for addresses, to be sent them, one of which was to be spoken on the first night, the brothers James and Horace wrote and published their collection of supposed *Rejected Addresses*, consisting of humorous imitations of different authors.—*Wheeler's Familiar Allusions*.

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. . . "and if *astute* in aught,
The love he had to *pleading* was in fault."

We need not wonder that his fame went forth among the attorneys, and that soon after he was called to the bar he was in considerable practice—as a fabricator of sham pleas, and an arguer of special demurrers. His name appears frequently in the Reports as counsel in special pleading cases; but, though "to the manner born," I must confess my inability to explain these mysteries to the profane.

There are only two cases on other subjects in which he is recorded as having been counsel while he remained at the bar. The first is *Rex v. Irvinghoe*, which came from the quarter sessions of his native county, and in which the question was, "whether a settlement was gained by a pauper who had been hired for a year by one master, and, with the consent of his first master, served part of the year under another?" This was quite adapted to Lee's capacity, and he argued it as elaborately as if the rights and liberties of Englishmen had depended upon it. He succeeded, and was probably as much pleased with himself as Erskine on the acquittal of Hardy and Horne Tooke,¹ for he in-

A.D. 1718.
His victory
in a GREAT
SETTLEMENT
CASE.

1. John Horne Tooke (1736-1812) was the son of John Horne, and assumed the title of Tooke after being adopted by William Tooke, of Purley. His family persuaded him, after taking his degree in 1758, to enter the Church, but his own inclination was for the law, and in 1779 he tried to obtain admission to the bar, but his clerical profession prevented him. Tooke had already become conspicuous as a democratic politician; at first as a friend of Wilkes, with whom, however, he speedily quarrelled and was in consequence attacked by Junius. In 1775 he was sentenced to a year's imprisonment and a fine, for saying that the Americans who fell at Lexington had been "murdered" by the English soldiers. He plunged actively into the political agitation which followed the French Revolution, and in 1794 he was committed for trial on account of his connection with the supposed treason of the Corresponding Society, but after an able and witty defence he was acquitted. After contesting Westminster twice without success, he was returned for Old Sarum in 1801, but a bill was passed in the next session rendering clerical persons ineligible. His last days were spent in easy retirement. Tooke had a great social reputation; his "*Diversions of Purley*" is an

duced that great sessions lawyer Lord Chief Justice Pratt to say, "If I lend my servant to a neighbor for a week or any longer time, and he goes accordingly and does such work as my neighbor sets him about, yet all this while he is in my service, and may reasonably be said to be doing my business. Therefore, I take this to be a service for the whole year under the first contract, and the settlement is at Ivinghoe."¹

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Again, when the famous appeal of murder was sued out against Bambridge and Corbett, the mode of proceeding being almost obsolete, Lee, from his black-letter reputation, was employed to conduct it. The trial coming on, he addressed the jury at great length, and exerted himself very unscrupulously to obtain a conviction; but he met with a signal defeat, which made him vow that in future he would have nothing to do with facts, and would stick to law alone.²

A.D. 1730.
He is
counsel in
appeal of
murder.

When in his 40th year—an age when ambition is said to rage with greatest fury—he was much annoyed by an offer to be brought into the House of Commons, by the interest of his family, for Chipping Wycombe, in Bucks. He long strenuously refused, but, being told that if he persisted in doing so the seat would be carried by the Tories, he succumbed, observing that, "as he came in with *King William*, he was bound to be a good Whig." However, we in vain look to see his name in the Parliamentary History; for while his brother George was a frequent and excellent speaker, and so became one of the leaders of the Leicester House party, no human power would have induced William to make a speech, unless he might wear his wig and gown and hold a brief in his hand. Although he voted steadily with the Government, he would

A.D. 1728.
His dislike
of the
House of
Commons.

original, though somewhat primitive, work on philology.—*Low and Pulling's Dict. of Eng. Hist.*

1. 1 Strange, 90.

2. 17 St. Tr. 401.

CHAP. never, even in the lobby or in private society, give
XXVI. any better reason for the line he took than that "*he came in with King William*, and he was bound to be a good Whig."

He is made
a Puisne
Judge.

The next offer which was made to him he accepted without hesitation, and he became a Puisne Judge of the King's Bench,—reaching the summit of his ambition, and better pleased than he could conceive himself to be by winning a battle equal to *BLenheim*,¹ or writing a poem more esteemed than *PARADISE LOST*. It was supposed, and said, that he had been promoted because he had so steadily proclaimed and proved himself to be "a good Whig;" but politics had nothing to do with the appointment. Sir Robert Raymond, then Chief Justice of the King's Bench, complained bitterly of the insufficiency of his *Puisnies*, particularly in the knowledge of *special pleading*, of which he himself, notwithstanding his general juridical acquirements, was by no means master; and he made a particular application to Lord Chancellor King, that a vacancy which then occurred in the court might be filled up by Mr. Lee, who was more eminent in this line than any other man in the profession. Being coifed, sworn in, and knighted, the new Judge took his seat in the Court of King's Bench on the 15th of June, 1730.

A.D. 1730.

He remained a Puisne Justice for seven years, under Lord Chief Justice Raymond and Lord Chief Justice Hardwicke, and was found exceedingly useful to them and to the public. Having concentrated all the energies of a mind naturally strong, and quickened by

1. *Blenheim* is situated on the northern bank of the Danube, near the place where the river is joined by a little brook, the *Nebel*. On Aug. 2, 1704, Marlborough, in concert with Prince Eugene of Savoy, won the great battle of *Blenheim* over the allied French and Bavarians under Marshal Tallard, who was there taken prisoner.—*Thompson's Hist. of Eng.*, chap. xxxviii. p. 266.

dialectical exercise, on one department of one science, ^{CHAP. XXVI.} he had attained in it to an unexampled skill. Moreover, its rules and analogies having a very extensive influence over the whole body of our law and procedure, few points arose in the course of a term on which his opinion was not valuable. His gave it with ^{The value of his} much modesty and discretion; not seeking to expose ^{opinion.} the ignorance of his brethren, or to parade his own knowledge, but setting the Chief Justice right by a whisper, and inducing a bystander to believe, when the judgment was given, that they had all perceived how it must be from the first,—insomuch that he was likened, by the knowing, to the helm which keeps the ship in her right course, without itself attracting any notice.

Sir William Lee particularly gained the favor of ^{His intimacy with} Lord Hardwicke, and is called by Horace Walpole ^{Lord} and other contemporary writers his “creature,” ^{Hard-} his “tool,” his “dependant,” and his “shadow.” Their great intimacy appears from Lord Hardwicke having employed Lee to assist him in bargaining for the estate in Gloucestershire from which he took his title, and to act as a trustee in his family settlements.¹

Lord Hardwicke, on becoming Chancellor, was ^{He is made} severely blamed for rewarding such services by pro- ^{Chief Jus-} moting a man well qualified for the subordinate sta- ^{ice of} tion which he occupied, but wholly unfit to be Chief ^{England.} Justice of England,—who, in addition to being a good special pleader, should be an enlightened jurist, experienced in the ways of the world, well qualified to address a legislative assembly, a scholar, and a gentleman.

No one can blame Sir William Lee for accepting the honor which was thrust upon him; and, public expectation being low, it was generally allowed that

1. Harris's Life of Lord Hardwicke, i. 183.

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he acquitted himself very reputably. His intentions were ever most pure and upright; his temper was well disciplined; his manners were bland; and, although it could not be said that he took an enlarged view of any subject, or did much to improve our code, his decisions between the parties litigating before him were substantially just.

A.D. 1737.

On Monday, the 13th of June, being the fourth day of Trinity Term, 1737, he took the oaths and his seat as Lord Chief Justice in the Court of King's Bench. Subsequently to the Revolution, when judges actually did discharge their duty in an independent manner, they ceased to make any parading professions of their good intentions, and inaugural speeches had become obsolete. Lord Chief Justice Lee is said materially to have altered the opinion which the bar entertained, or at least expressed, of his law, by retaining a French cook, and giving frequent rounds of good dinners with copious draughts of claret and champagne.¹ He likewise had a villa at Totteridge, which still belongs to his family, where he used to entertain professional parties very hospitably, and tell them how he came in with King William. Dependants and flatterers clustered round him, and before he died he was praised as one of the greatest of Chief Justices.

His in-
creasing
popularity.His judg-
ment in
favor of
the
"rights
of women."

His fame may have increased from his having had the good word of the fair sex; he certainly stood up for the rights of woman more strenuously than any English judge before or since his time. He had to decide "whether a female may by law serve the office of parish sexton?" and "whether females were entitled to vote at the election of a sexton?" John Olive and Sarah Bly were candidates for the office of

1. He was in the habit of particularly praising the precept of Lord Burleigh to his son "to keep an orderly table;" by which he understood *a table covered with good dishes set out in orderly fashion.*

sexton in the parish of St. Botolph in the City of London. She had 169 male votes and 40 female. He had 174 male votes and 22 female, and he was sworn in. The validity of the election coming on to be determined in the Court of King's Bench, the gentleman contended that all the votes for the lady were thrown away, as she was disqualified on account of her sex; and at any rate that he had a majority of lawful votes, as the female votes on both sides must be struck off from the poll, a woman being no more entitled to vote for a sexton than for a member of parliament or for a coroner, which Lord Coke says "they may not do although they have freeholds and contribute to all public charges—even to the wages of knights of the shire, which are to be levied *de communitate comitatus*." (4 Inst. 5 Reg. Brev. 192.)

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It is judg-
ment in
favor of
the "rights
of women,"
continued.

Lee, C. J.: "I am clearly of opinion that a woman may be sexton of a parish. Women have held much higher offices, and, indeed, almost all the offices of the kingdom: as Queen, Marshal, Great Chamberlain, Great Constable, Champion of England, Commissioner of Sewers, Keeper of a Prison, and Returning Officer for members of parliament.¹ . . . As to the second point, it would be strange if a woman may herself fill the office, and yet should be disqualified to vote for it. The election of members of parliament and of coroners stands on special grounds. No woman has ever sat in parliament or voted for members of parliament, and we must presume that when the franchise was first created it was confined to the male sex. There was no reason for such a restriction respecting the office of sexton, whose duties do not concern the morals of the living, but the interment of the dead. The female votes being added to the poll, Sarah Bly has the majority, so that she, and not John Olive, is now the lawful sexton of this parish."

1. Spelman's Glossary, 497; 3 Keble, 32; Blunt's Tenures, 47; Dyer, 285; Hob. 148; Brady's History of Boroughs. Lady Packington was relieving officer at Aylesbury; and the famous Countess of Pembroke, being hereditary sheriff of Westmoreland, attended the judges in that capacity at the assizes.

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The Puisnies concurring, judgment was given in her favor.¹

Other important points decided by him.

I do not find any other cases which came before him in the King's Bench so fully reported, but, from short notes in Strange, we find that he decided several important points—as that “it is a misdemeanor to take a young lady out of the care of a guardian appointed by the Court of Chancery, and to marry her, although she goes away voluntarily;”² that “it is a misdemeanor to keep gunpowder where it may be dangerous to the King's subjects;”³ that “it is actionable to say of a justice of the peace, in the execution of his office, that *he is a rogue*;”⁴ that “at common law a factor, although empowered to sell, cannot pledge the goods consigned to his care;”⁵ that “if a ship, insured in time of war against all perils except capture, sails on the voyage and is never heard of, it shall be presumed that she foundered at sea, so as to make the underwriters liable;”⁶ that “an action lies for keeping a dog, known by his master to be accustomed to bite men, whereby the plaintiff was bitten, although the damage arose from the plaintiff having accidentally trod upon the dog's toes;”⁷ and “that a pardon being pleaded to an indictment for murder, after a special verdict found, the prisoner is entitled to be discharged without finding sureties to abide an appeal by the heir of the deceased.”⁸

Trials of the rebels at St. Margaret's Hill.

Lord Chief Justice Lee presided at the special commission which sat for the trial of those who had taken part in the rebellion of 1745. Under an act of parliament which authorized the Government to prose-

1. 2 Str. 1114. *Same Case*, MS. Taking the converse of Lee's rule, a woman may be a Director of the East India Company, as she is entitled to vote for that office.

2. *Rex v. Lord Ossulston*, 2 Str. 1107.

3. *Rex v. Taylor*, 2 Str. 1167.

4. *Kent v. Pocock*, 2 Str. 1168.

5. *Patterson v. Tash*, 2 Str. 1178.

6. *Green v. Brown*, 2 Str. 1199.

7. *Smith v. Polak*, 2 Str. 1264.

8. *Rex v. Chetwynd*, 18 St. Tr. 289.

cute them in any county in England, a Court, attended by all the Judges, assembled at St. Margaret's Hill, in the borough of Southwark. Most of those who were to be tried had been engaged in the siege of Carlisle, and had surrendered to the Duke of Cumberland.¹ The charge to the grand jury was given by Lee, who fully explained to them how they, in Surrey, came to have cognizance of offences committed in a distant part of the kingdom, and laid down to them very distinctly the doctrine of compassing the King's death and of levying war against him.

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July, 1746.

Lee's
charge to
the grand
jury.

The indictments found against the Earls of Kilmarnock² and Cromartie, and Lord Balmerino,³ were

1. William Augustus, Duke of Cumberland, third son of George II. of England, born April 15, 1721, died at Windsor, Oct. 31, 1765. He was wounded at the battle of Dettingen in 1743, and in 1745 he received the command of the allied army, and fought the battle of Fontenoy against Marshal Saxe, in which the French were victorious. He was next sent against the Pretender in Scotland, whom he overthrew at the battle of Culloden; but the glory of this victory was stained by the cruelties and excesses of the victors. He was afterwards appointed by the King commander-in-chief of the British army, and sent to the Netherlands; was defeated at Lafeldt by Marshal Saxe in 1747, and gained no advantages in this war, which was terminated by the Peace of Aix-la-Chapelle. At the commencement of the Seven Years' War the Duke of Cumberland was despatched to Germany, when the victory of Marshal d'Estrées at Hastenbeck forced him to the convention of Closter Seven (1757), by which the English army, 40,000 strong, was disarmed and disbanded, and Hanover was placed at the mercy of the French, who ravaged it at their will. On his return to England the King was so dissatisfied that the Duke threw up his appointments and was never again invited to take office.—*Appl. Encyc.*, vol. v. p. 568.

2. William Boyd, fourth Earl of Kilmarnock, a Scottish nobleman, born 1704. Having joined the Pretender's standard in 1745, he displayed considerable courage till the fatal battle of Culloden, when, finding it impossible to escape, he surrendered himself prisoner to the King's troops. He was found guilty of high treason, and beheaded on Tower Hill, Aug. 18, 1746.—*Cooper's Biog. Diet.*

3. Arthur Elphinstone, Lord Balmerino (b. 1688, d. 1746), was a noted Jacobite. He early entered the army, and held command of a company of foot in Lord Shannon's regiment under Queen Anne; but on the accession of George I. he resigned his commission. Elphinstone took part in the Jacobite rebellion of 1715, and fought at the battle of Sheriffmuir. He escaped to France and served in the French army until 1733. He was one of the first to repair to the Young Pretender's standard in

CHAP. immediately removed by *certiorari* to the House of
XXVI. Peers,—but those against commoners were proceeded with before Surrey juries as expeditiously as the forms of law would permit.

A. D. 1746,
Colonel
Townley's
Case.

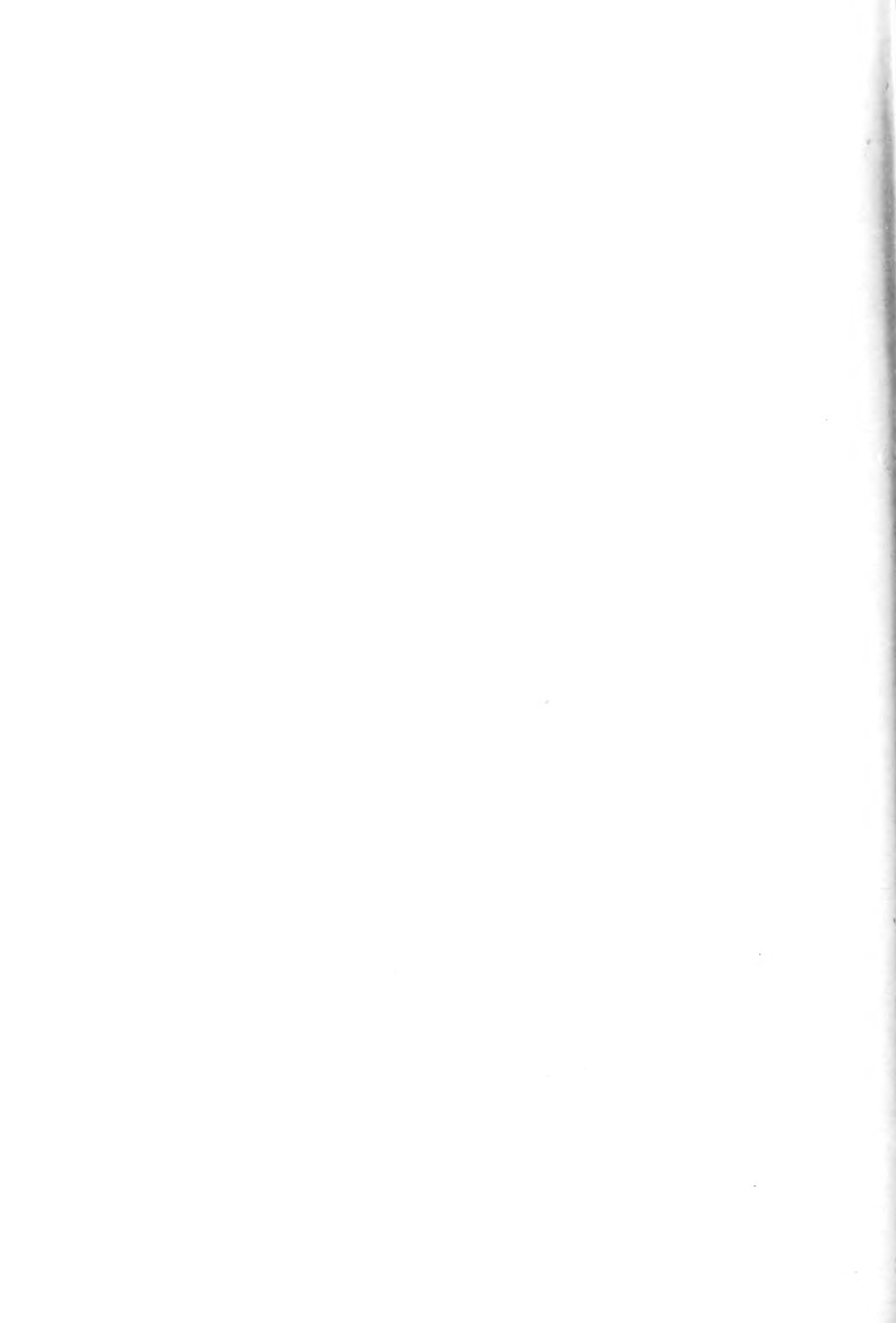
The first case taken was that of Colonel Francis Townley, the representative of an ancient family in Lancashire, who, entering the French service, had distinguished himself much at the siege of Philipsburgh and on various other occasions, and who still held a commission from the King of France when he joined the army of the Pretender.¹ He set up two

1745, and at once became colonel, and captain, of the second troop of Charles Edward's life-guards. Early in 1746 he succeeded to the title of Balmerino on the death of his brother. Taken prisoner at the battle of Culloden he was tried for high treason before the Lord High Steward's Court in Westminster Hall, found guilty, and executed. He maintained his principles to the end, and his last words were, "God bless King James."—*Low and Pulling's Dict. of Eng. Hist.*

1. Charles Edward, commonly called *The Young Pretender*, was born at Rome Dec. 31, 1720, and died at Florence Jan. 31, 1788. He was the eldest son of James, who, by his adherents, was designated as the third King of England of that name. On July 16, 1745, he landed on the coast of Lochaber, in Scotland, and at Perth published a manifesto, containing a declaration of his claims to the English throne. About 1,500 Highlanders joined his standard, at the head of whom he marched to Edinburgh; but though he took the city the castle resisted his efforts. Sir John Cope now hastened against the young adventurer, who encountered him at Preston Pans, and defeated him. This advantage inspired the insurgents, and increased their numbers to such a degree that they made an irruption into England and invested Carlisle, which surrendered in less than three days. From thence Charles advanced to Fenrith, and pushed on as far as Manchester, where he established his headquarters, and was joined by about 200 English under Colonel Townley. Thence he pursued his course to Derby, with the intention of going by the way of Chester into Wales, where he expected to be joined by a number of his partisans. This intention, however, was overruled; nor did he, as he might have done, march towards London, where he had many adherents who would have welcomed his approach. Instead of this he wasted his time, and on hearing of the arrival of the Duke of Cumberland made a precipitate retreat into Scotland, where, on the 28th of January, he defeated the royalists under General Hawley, at Falkirk. The elation, however, produced by this advantage was of short duration, for, April 16, 1746, the representative of the house of Stuart and that of the reigning family encountered each other on the plains of Culloden, near Inverness. The battle began about noon, when the English artillery did terrible execution among the Highlanders, who fought with desperation, but, being unsup



JOHN HORNE TOOKE.



defences. The first was, that he ought to be treated as a prisoner of war and not as a traitor, for he had acted under the authority of a foreign sovereign, who was making open war against the Crown of Great Britain,—therefore, instead of being executed for high treason, he was entitled to be exchanged under the cartel lately established between the two countries, according to the usages of honorable hostilities. 2dly: At all events, if he were still liable to be treated as an English subject, he claimed the benefit of the articles of the capitulation of Carlisle, signed by the Duke of Cumberland, engaging that, on the surrender of the city, the prisoners taken in arms “shall not be put to the sword, but be reserved for the King’s pleasure,”—amounting, as he contended, to a solemn pledge that their lives should be spared, and, therefore, barring any capital proceedings against them.

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Lee, C. J.: “Neither defence can avail: 1. The prisoner is Lee’s a native-born subject of this realm, and cannot free himself from the allegiance which he owes to his own sovereign by entering into the service of a foreign state. Our law says, *Nemo potest exuere patriam*.¹ The very fact relied upon that the prisoner is in the service of France, a country with which we are now at war, is an *adherence to the King’s enemies*, and an overt act of high treason. 2. The second defence we could give no effect to here, and it could only be made the foundation of an appeal to the Crown to withdraw a prosecution which ought not to have been instituted; but, as it has been brought forward, I think I am bound to say that, in my opinion, there is no foundation for it in reason, justice, or honor. The only fair meaning

answer to
Townley’s
two de-
fences.

ported by the French, were completely overthrown. The slaughter was dreadful, and, to the disgrace of the victor, many of the Scotch were butchered in cold blood. Charles Edward escaped with great difficulty, and, after wandering from place to place about five months, got on board a privateer, which conveyed him to France, from whence, at the peace, he was obliged to go to Rome, where he married the Princess Stolberg. In 1759 he visited London in disguise, but ministers and the King knew of his arrival, though they prudently took no notice of it. He left a daughter, called the Princess of Albany.—*Cooper’s Biog. Dict.*

1. “No one can free himself from his allegiance to his country.”

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of the words relied upon is, that the prisoners should not immediately be put to death by martial law as rebels taken in arms, but should have the benefit of a fair trial according to our humane forms of procedure before the Judges of the land."¹

An execution
for
high
treason.

The prisoner was, of course, found guilty; and, to show the customs and feelings of Englishmen in the middle of the last century, I add a short contemporaneous account of his execution, which was read then without any wonder or any disapprobation: "After he had hung six minutes he was cut down, and, having life in him as he lay upon the block to be quartered, the executioner gave him several blows on his breast, which not having the effect designed, he immediately cut his throat; after which he took his head off; then ripped him open, and took out his bowels and heart, and threw them into a fire, which consumed them; then he slashed his four quarters, and put them with the head into a coffin, and they were carried to the new jail in Southwark, where they were deposited till August 2, when his head was put upon Temple Bar, and his body and limbs suffered to be buried." Chief Justice Lee, and five other Judges, in the discharge of their duty signed the warrant by which these revolting cruelties were authorized.²

M'Grow-
ther's Case.

The next trial in which any question of law arose was that of *Alexander M'Growther*, a lieutenant in the Duke of Perth's regiment, which had formed a part of the Pretender's army. The prisoner stated, by way of defence, "that he was a vassal of the Duke of Perth; that he was bound to obey the orders of his superior; that, nevertheless, having refused to do so, the Duke of Perth had threatened to burn his house to the

1. A mighty small benefit, certainly; as, if tried for treason, they could not have the remotest chance of escape, and it would have been better for them to have been shot, than hanged, embowelled while yet alive, beheaded, and quartered.

2. 18 St. Tr. 329-352.

ground, and to lay waste all that belonged to him, if he would not enter into the rebellion." He accordingly called four witnesses, who deposed to those threats, adding "that the Duke's men had begun to bind him with cords before he enlisted; that he yielded, to save himself from ruin; and that by the custom of the country the vassal is considered bound to execute the orders of his superior, whatever they may be." CHAP.
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Lee, C. J.: "We cannot hear of any such custom. The King's subjects owe allegiance to the King alone, and are bound only to obey the law. There is not, nor ever was, any tenure which obliges tenants to follow their lords into rebellion. And as to the matter of force, the fear of having houses burnt or goods spoilt, or a slight injury to the person, is no excuse in the eye of the law for joining and marching with rebels. The only force that excuses is, a force leading to present fear of death, and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence, to show an actual overruling force, and that he quitted the service of the rebels as soon as he could,—according to the rule laid down in *Oldcastle's Case*, 1 Hale, 50, that the prisoner joined *pro timore mortis et recessit quam cito potuit*.¹ But here the prisoner pretends to prove force only on the 8th of August, and he continued with the rebels and bore a commission in their army till the surrender of Carlisle on the 30th of December."

The jury, without going from the bar, found a verdict of *guilty*. This prisoner, however, was reprieved and afterwards pardoned.²

Alexander Kinloch and Charles Kinloch having The Kin-
lochs' Case.

1. "On fear of death, and left as soon as he was able."

2. Foster says: "Many of the Scotch prisoners made the like defence, and the same directions in point of law were given. The matter of fact, whether force or no force, and how long that force continued, with every circumstance tending to show the practicability or impracticability of an escape, was left to the jury on the whole evidence." (Foster, ch. ii. s. 8; East's Pleas of the Crown, ch. ii. s. 15; 15 St. Tr. 391-394.) See likewise the trial of Fergus M'Ivor and Evan Dhu M'Combick, which took place at Carlisle a few weeks after. (3 Waverley, 300.)

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The Kin-
lochs'
Case, con-
tinued.

pleaded *not guilty*,—after their trial upon this plea had begun, insisted that they were entitled to be acquitted, because they were native-born Scotchmen, and by the articles of union between Scotland and England Scotland was to retain her own laws, so that they ought to be tried by the Court of Justiciary in Scotland. The Judges ruled that this objection, if well founded, could only be taken advantage of by plea in abatement to the jurisdiction of the Court; and, in favor of life, they allowed the jury to be discharged, the plea of *not guilty* to be withdrawn, and the plea in abatement to be substituted for it. To this the Attorney General demurred, and the point was argued at great length:

Lee, C. J.: “We are all of opinion that the birth, residence, and apprehension of the prisoners in Scotland are facts perfectly immaterial in the present case. So it would have been even at common law; for at common law every man is triable, not where he was born, resided, or was apprehended, but where the offence was committed. Moreover, we are now sitting under a special act of parliament which gives us jurisdiction in all treasons without any distinction of persons or localities.”

The plea in abatement being overruled, the prisoners again pleaded *not guilty*; and, being tried by another jury, were convicted on clear evidence, for they had taken a very active part in the Pretender's invasion of England. But they moved, in arrest of judgment, that the conviction was unlawful, as the Court had no power, even with their consent and at their request, to discharge the first jury; and that being once given in charge to that jury, they could not lawfully be tried by any other. When the question was argued before the twelve Judges, the counsel for the prisoners gave instances in which the assumed power of discharging the jury, after the commencement of the trial, had been abused to the oppression of the subject; and relied upon a *dictum* of Lord Holt, that “in criminal cases a juror cannot be withdrawn

but by consent, and in capital cases it cannot be done even with consent."

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XXVI.
The Kin-
lochs' Case, con-
tinued.

Lee, C. J.: "With the exception of my brother Wright, we are all of opinion that the conviction is regular, and that sentence of death must be passed upon the prisoners. The rule that a trial once begun must proceed to a conclusion before the same jury, cannot bind in cases where it would be productive of manifest injustice or great hardship to the prisoner. In the present case, the objection urged by the prisoners of our want of jurisdiction might have turned out to be well founded; but it could not have been taken advantage of under the plea of *not guilty*. Liberty was therefore given to them to withdraw that plea. When withdrawn, the jury had no issue to try, and must therefore of course be discharged. Consequently they have no right to complain of that which was a necessary consequence of an indulgence shown them by the Court. The authority of Lord Holt is high; but Lord Hale says, 'In case a man in a frenzy happen by some oversight to plead to his indictment, and put himself upon his trial, and it appeareth to the Court upon his trial that he is mad, the judge in discretion may discharge the jury, and remit him to jail, to be tried after the recovery of his understanding.'" *Wright, J.*: "I admit that the discharging of the jury in the present case was an instance of great indulgence to the prisoners; but I think it is safer to adhere to a general rule, than on any account to establish a power in judges which has been grossly abused and may be again. The policy of the law of England, and, indeed, the true principles of all government, will rather suffer many private inconveniences than introduce one public mischief. I consider the trial by the same jury which is sworn and charged with the prisoner as part of the *jus publicum*, as a sacred *depositum* committed to the judges which they ought to deliver down inviolate to posterity."

The usual sentence in cases of high treason was accordingly passed upon the prisoners, but the difference of opinion in the Court saved their lives, and they were pardoned on condition of being sent abroad.¹

The last trial under this special commission was

1. 18 St. Tr. 395-416.

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XXVI.
Sir John
Wedder-
burn's
Case.

that of Sir John Wedderburn. The Government had resolved to make an example of a *non-combatant*, and indicted him for high treason, although he had not mounted the white cockade, and he never carried any arms but a small sword, then worn by every private gentleman. But it was proved that he accepted the appointment, under the Pretender, of collector of excise, and that accordingly he did collect the excise in several places where the rebel army lay. His counsel objected that this evidence did not support the indictment; but Lord Chief Justice Lee declared the opinion of all the Judges, that collecting money for rebels is an overt act of high treason. The prisoner was convicted, and executed as a traitor on Kennington Common.¹

Lee's part
in the trial
of the rebel
peers be-
fore the
Lords.

When the rebel peers were tried before the House of Lords, Chief Justice Lee and the other Judges attended as assessors, but only one point of law was referred to them,—“whether the dates given to the overt acts of treason in the indictment were material?”—and Lee, as the organ of his brethren, explained to the astonished Scotch this mystery of English procedure, that “time and place must be laid in the indictment with certainty, but that evidence may be admitted to prove the offence to have been committed at any other time or any other place within the same county.”²

Lord Chief Justice Lee, notwithstanding his de-

1. 18 St. Tr. 425. When a boy I knew his son, who was called Sir John Wedderburn, although the baronetcy had been forfeited by the attainder. He too had been “*out in the '45*,” and he told very marvellous stories of his adventures.—Kennington Common was an enclosure comprising some twenty acres in Lambeth, London, once celebrated as a place of gathering for pugilists and also itinerant preachers, and memorable as the scene of the great Chartist meeting in 1848. It has now been converted into a park. Whitefield used to preach here to great crowds of people.—*Wheeler's Familiar Allusions*.

2. 18 St. Tr. 442–858.

fective elocution and very limited acquirements, got on pretty well in the discharge of the duties of his high office, till he broke down in the trial of a prosecution for libel ordered by the House of Commons; after which he lost all authority, and experienced constant mortification. William Owen, a bookseller, having published a pamphlet which severely and justly censured the conduct of the House of Commons in committing to Newgate the Honorable Alexander Murray because he refused to fall down on his knees before them, an address to the Crown was carried, with a foolish unanimity, that the Attorney General should be directed to prosecute the publisher. Sir Dudley Ryder accordingly filed a criminal information against Owen, and, at the trial, insisted that he was entitled to a verdict of *guilty* on merely proving that a copy of the pamphlet had been sold by the defendant. But he was encountered by Pratt (son of the Chief, and afterwards Lord Camden), who strenuously insisted that as, in an indictment for an assault with intent to ravish, the *intention* must be proved, or there must be an acquittal, so here the jury must consider whether the *intention* of the writer was to defame the representatives of the people, or, by exposing and correcting their errors, to render them more respectable and useful?

The Chief Justice was much shocked by this doctrine, but he had not the art which enabled Lord Raymond to combat it successfully, and which was afterwards exhibited more strikingly by Lord Mansfield against the publishers of JUNIUS. In summing up, without attempting to take off the effect of the popular arguments urged for the defendant, he dryly said, "The publication of the pamphlet being thus proved, and, indeed, not being denied by the defendant, I am of opinion that you are bound to find him

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A.D. 1752.
Signal defeat of
Chief Justice Lee in
a trial for
libel.

His summing up.

CHAP. *guilty*. I have ever supported the principles of liberty
XXVI. established at the Revolution, but I must keep juries
to questions of fact.¹ Whether the pamphlet be a
libel, is matter of law; if it be not, the defendant
might have demurred to the information, or may,
after your verdict of *guilty*, move in arrest of judg-
ment or bring a writ of error." The jury withdrew,
and when they returned, after having been absent two
hours, the following scene was enacted:

Scene on
the return
of the jury.

Clerk of the Court: "Gentlemen of the jury, are you agreed
on your verdict? Is the defendant guilty or not guilty?"
Foreman: "GUILTY!" *Chief Justice*: "You could not do
otherwise." *Jurymen*: "No! no! my Lord! it is all a mistake,
—we say NOT GUILTY." *Foreman*: "Yes, my Lord, it was a
mistake; I meant to say NOT GUILTY." *Bystanders*: "Huzza!
Huzza!! Huzza!!!" *Attorney General*: "My Lord, this must
not be; I insist on the jury being called back and asked their
opinion upon the only question submitted to them." *Chief
Justice*: "Gentlemen of the jury, do you think the evidence laid
before you of Owen's publishing the book by selling it is not
sufficient to convince you that the said Owen did sell this
book?" *Foreman*: "NOT GUILTY! my Lord; NOT GUILTY!"
Juryman: "Yes, my Lord, that is our verdict, and so we say
all." *The rest of the Jury*: "So we say all, so we say all."

There was a prodigious shout of applause in Guild-
hall, and at night there were bonfires in the streets to
celebrate the triumph over an unpopular House of
Commons.²

A.D. 1753.
Effect on
Lee's
position.

A degree of ridicule was now attached to Lee's
name, and he found his position very uncomfortable;
for not only would juries often find verdicts contrary
to his direction, but the bar paid little deference to
him, and even his *Puisnics* were too apt to show that
they considered themselves his betters.

1. I am surprised he did not inform them that "he came in with King
William, and therefore had always been a good Whig."

2. 18 St. Tr. 1203; *post*, Life of Sir Dudley Ryder.

Some legal chroniclers, not familiar with official usages, have said that under these circumstances, like his predecessors in the reigns of Charles I. and James I., he meant to quit law for politics, and that he accepted the office of Chancellor of the Exchequer. This fact is literally true. The seals of Chancellor of the Exchequer were indeed handed over to him on the 3d of March, 1754, and they remained in his possession till within a few days of his death. He was appointed, however, only under the immemorial custom that when the office of Chancellor of the Exchequer suddenly becomes vacant, and a difficulty arises about effectively filling it up, it is nominally held *ad interim* by the Chief Justice of the King's Bench for the time being, who does the formal acts necessary for the progress of business in the Exchequer. On the sudden death of Mr. Pelham,¹ Lord Chief Justice Lee held the seals of Chancellor of the Exchequer till the nomination of Mr. Legge; but in this capacity he never did anything more than sign his name or seal a writ, and the Duke of Newcastle had as little thought of introducing him into the new

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Chief Justice Lee
Chancellor,
of the Ex-
chequer.
March 3,
1754.

His work
in this
capacity.

1. Thomas Pelham, Duke of Newcastle, an English Whig minister of state, born in 1693, was the eldest son of Sir Thomas Pelham, of Sussex. His mother was the sister of John Hollis, Duke of Newcastle, who, dying in 1711, left a princely fortune to the subject of this article. In 1715 he was created Duke of Newcastle, and in 1724 appointed Secretary of State. In 1754 he was promoted to the office of First Lord of the Treasury, or Premier, which was then vacated by the death of his brother, Henry Pelham. He resigned reluctantly in November, 1756, and, after a ministerial crisis, formed a coalition with Pitt, and was again Prime Minister, or coördinate chief minister, from 1757 until May, 1762, when Lord Bute became Premier. "His love of influence," says Macaulay, in his review of "Walpole's Letters to Horace Mann," "was so intense a passion that it supplied the place of talents, that it inspired even faculty with cunning. . . . All the able men of his time ridiculed him as a dunce, a driveller, a child who never knew his own mind for an hour together; and he overreached them all round." He died, without issue, in 1768, when the title passed to Henry Clinton, Earl of Lincoln, who had married a daughter and heiress of Henry Pelham.—*Thomas' Biog. Dict.*

CHAP. XXVI. Cabinet as of making him Archbishop of Canterbury.¹

The time was at hand when Lee was to be freed from the irksomeness of his position by being transferred to a better world. His health and spirits having been some time declining, on the evening of Wednesday, the 3d of April, 1754, he was struck with apoplexy, and, early in the morning of Monday, the 8th of the same month, he expired, in the sixty-sixth year of his age, and the seventeenth of his Chief Justiceship. He was buried at Hartwell, where a handsome monument has been erected to his memory.

His death.
April 8,
1754.

His diary
and almanacs.

There have been recently given to the world very copious extracts from a sort of diary that he kept, under the title of "Miscellanea," and from entries made by him in a succession of almanacs which he carefully preserved;² but these are perused with much disappointment. They might have contained some lively sketches of his own adventures, and some amusing anecdotes of his contemporaries, although we could not have expected in them much profundity of thought or brilliancy of fancy; but they consist chiefly of legal antiquities with which almost every one is quite familiar, and of dull observations on dull books which he had read.³ He seems to have been a be-

1. One learned author has even suggested that the fact of Lee "filling the office of Chancellor of the Exchequer as well as of Chief Justice might have been the reason of his remaining a Commoner;"—as if he had been in the habit of opening the Budget in the House of Commons. (Harris's Life of Lord Hardwicke, iii. 517.)

2. Law Magazine, xxxviii. 217, xxxix. 62.

3. There are some historical notices likewise, showing that my Lord Chief Justice was very little acquainted with events which had happened before his own birth and *the coming in of King William*; e.g.: "It appears by the letters of D'Estrade that Lord Clarendon advised the sale of Dunkirk, and that Lord Clarendon was also extremely averse to the Presbyterians, who by that history appear to have behaved very well, and to have been for the Restoration." He thinks it was unknown, before the publication of these letters, that Lord Clarendon had anything to do with the sale of Dunkirk, or behaved with ingratitude and bad faith to the Presbyterians.

liever in the old theory of medicine founded on *radical* CHAP. XXVI. *heat* and *radical moisture*, and to have paid great attention to the directions of almanac-makers respecting His diary and almanacs, continued. diet and blood-letting. Thus he says, under date "October, 1737.—Dr. Cheney told me that the Bath waters were the best remedy he knew for the stomach, or for vapors arising from too great coldness of blood; and wherever there was not sufficient *calidum naturale*,¹ he knew no outward help equal to them. He laid down the rule that to hot blood cooling waters should be applied." His almanac was "Rider's British Mer-
lin, adorned with many delightful and useful verities, fitting all capacities in the islands of Great Britain's monarchy; with notes of husbandry, etc. Compiled, for his country's benefit, by Cardanus Rider." The following very wholesome precepts of this sage were particularly valued by the Chief Justice: "It's hurtful to fast long. Use meats that are moderately hot; for the best physic is warm diet, warm clothes, and a merry, honest wife. Consult with your tailors as well as physicians. Let a warm fire, and a cup of generous wine or good October beer, be thy bath; the kitchen thy apothecary's shop; hot meats, and broth, thy physic; and a well-spread table the proof of thy charity to thy poor neighbor."

Notwithstanding all these precautions, he was very His danger from the jail fever. nearly cut off when attending the Old Bailey sessions, in May, 1750. The jail fever then raged in Newgate, as in other prisons, and (what was no uncommon occurrence in those times) it was communicated, by the prisoners brought into court for trial, to the judges, the jurymen, and the witnesses. He escaped, though exposed to the contagion; but Mr. Justice Abney, and many others, perished. He made a sharp remonstrance to the Lord Mayor and aldermen of London,

1. "Natural heat."

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and preventives were introduced which are still kept up at the Old Bailey—such as fumigating the court several times a day by means of a hot iron plunged in a bucket filled with vinegar and sweet-smelling herbs.¹

His two
wives.

Valuing above all things “a merry, honest wife,” soon after he had lost his first—Anne, daughter of John Goodwin, Esq., of Burley, in the county of Suffolk,—he married, secondly, Margaret, daughter of Roger Drake, Esq., and relict of James Melmoth, Esq., who, on the authority of Lord Hardwicke, was “an agreeable lady, with 25,000*l.* fortune.”² But he himself records this event with wonderful brevity, for, in his almanac for 1733, after writing “Six bushels of oats for four horses per week; hempseed good in their corn; walking them in dewy grass in the morning, very good: for rheumatism, elder tea,”—he only adds these words: “I MARRIED TO MRS. M. M.” (meaning Mrs. Margaret Melmoth). He lived happily with her till May, 1752; but he makes no further mention of her, living or dead.

His great-
ness in his
own time.

It may alarm some who complacently exult in their present consequence, and confidently calculate on enjoying a lasting reputation, to know that Chief Justice Lee not only considered himself, but was considered by many in his own day, to be a great man. He was frequently a *dedicatee*, and the *dedicators* ascribed to him every virtue under heaven. Even after his death, when he could no longer give away masterships or clerkships, nor encourage or frighten young barristers by his smile or his frown, thus wrote Sir James Burrow—a very able man, afterwards the reporter of Mansfield:

His *éloge*
by Sir
James
Burrow.

“He was a gentleman of most unblemished and irreproachable character, both in public and in private life; amiable and

1. Gentleman's Magazine, xx. 333.

2. Harris's Life of Lord Hardwicke, i. 233.

gentle in his disposition; affable and courteous in his deportment; cheerful in his temper, though grave in his aspect; generous and polite in his manner of living; sincere and deservedly happy in his friendships and family connections; and to the highest degree upright and impartial in the distribution of justice. He had been a Judge of the Court of King's Bench almost twenty-four years; and for near seventeen had presided in it. In this state the integrity of his heart and the caution of his determination were so eminent, that they probably never will, perhaps never can be, excelled."¹

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Sir James has been laughed at for concluding with this anti-climax: "He was peculiarly master of that sort of knowledge which respects the settlement of the poor;" but I doubt very much whether the legal hero thus extolled would not himself have been gratified by the panegyric.

Lord Chief Justice Lee is now represented by his great-grandson, the very learned civilian, Dr. Lee, who has inherited Hartwell and the other large estates of his family.²

1. Burrow's Settlement Cases, p. 323, 4to, 1763.

2. Since I finished the above little memoir, by the kindness of Dr. Lee (for which I am most grateful) I have had an opportunity of perusing all the Chief Justice's MSS., amounting to above 100 volumes; but I have been unable to extract anything from them for the instruction or amusement of the reader. They prove the extraordinary industry of the compiler during the whole course of his long life. His *Commonplace Book* is stupendous, and he had digested reports of an immense number of cases decided while he was a student and at the bar. Beyond his own profession he appears to have had some taste for metaphysics, and he copies passages from Locke, Hobbes, and Bishop Berkeley; but in the whole mass I can find nothing original, either grave or gay. His note-books from the time he was made a Judge, both in civil and criminal trials, are extant, without any incident being recorded in them, or any remark being made on the counsel who pleaded before him. None of the letters he received are preserved, and there is the draught of only one letter written by him. This was to Lord Hardwicke, and describes the writer's growing infirmities: "As to my present state of health," says he, "it is but low, and I cannot walk at all without help. What my future condition will be, God only knows. But as long as I exist I trust and hope the consciousness I have of your Lordship's judgment and integrity will remain; and may your counsels long, very long, flourish, is the most sincere wish of your Lordship's most humble servant, W. LEE."

CHAPTER XXVII.

LIFE OF CHIEF JUSTICE RYDER.

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Sir Dudley
Ryder.

I HAVE one other dull Chief Justice of the King's Bench to take in hand, but I am comforted by the recollection that he was immediately succeeded by the most accomplished Common-law Judge who presided in Westminster Hall during the eighteenth century. Although SIR DUDLEY RYDER was eminent in his profession, as well as a man of spotless character, his career was without any stirring incidents; he was not distinguished either in literature or politics, and his intimacies were chiefly with men as insipid as himself. Unluckily for his biographer, he not only never excited much admiration in public life, but he did no act deserving of severe censure, and nothing dishonorable was even imputed to him. Yet I cannot pass over in silence a man who filled the important office of Attorney General much longer than any of his predecessors or successors, who was for many years the colleague of Mansfield, who ranks among the Chief Justices of England, whose patent of peerage was signed when he was suddenly snatched away, and whose death produced a very memorable crisis in the party history of our country.

His origin. The Ryders are all said to be descended from the ancient family of Rythre, which was seated for many ages at Rythre, in the hundred of Barkston, in the county of York; but the line we are considering cannot be distinctly traced higher than the Reverend Dudley Ryder, who, in the beginning of the seven-

teenth century, was a Nonconformist minister at Bedworth, in the county of Warwick. Although a zealous Puritan, he was not without worldly ambition; and he prophesied that in his descendants the name of Ryder would recover and exceed its ancient splendor. He did not live to see the fulfilment of this prophecy, but one of his grandsons was Archbishop of Armagh, and another was Chief Justice of England. In the first generation after him there was no appearance of such an elevation, for his two sons, John and Richard, were both tradesmen. John, the father of the Irish Primate, kept a haberdasher's shop at Nuneaton, in Warwickshire. Richard, the father of the Chief Justice, was a mercer in West Smithfield, in the city of London. A love of learning, however, was still hereditary in the family; the Reverend Dudley's library was divided among his descendants, and they were remarkable for intelligence as well as sobriety of manners.

Sir Dudley, whose career we are now to follow, ^{His education.} was the second son of the mercer, and was born in the year 1691. He is the first Englishman I read of who laid the foundation of future eminence at a Scotch University; being in due time to be followed by an illustrious band of successors, including Lord Melbourne¹ and Lord John Russell.² After a tolerably

1. William Lamb, Viscount Melbourne, a popular English statesman, son of Sir Peniston Lamb, afterwards Lord Melbourne, was born in 1779. He entered the House of Commons in 1805, and advocated a moderate Whig policy. His father dying in 1828, he inherited his title, entered the House of Lords, and, on the formation of Earl Grey's ministry, in 1830, became Secretary of State. He was appointed First Lord of the Treasury in 1834; but the Tories, under Peel and Wellington, soon gaining the ascendant, he was compelled to resign. In 1835 he succeeded in forming a Whig ministry, which lasted six years. He was distinguished for his tact and popular qualities and accomplishments. Died in 1848.—*Thomas' Biog. Dict.*

2. Earl Russell, long and perhaps better known as Lord John Russell, an English statesman, was the youngest son of the sixth Duke of Bedford, and received his education at Westminster School and at the University of Edinburgh, where he had the celebrated Dugald Stew-

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He is
initiated in
Roman
civil law at
Leyden.

good school education at a dissenting academy at Hackney, he studied some years at Edinburgh, which was then rising into celebrity from the eminence of its professors. Being destined to the profession of the law, he followed the custom, which he found then almost universal among Scotchmen who were to pass as advocates, of going to Leyden to be initiated in the Roman civil law. Both there and at Edinburgh he enjoyed the opportunity, which was still much prized by his family, of having the Gospel preached and its rites administered in true Genevese Presbyterian purity. When mixing in after-life with those who had been bred at the English public schools and the English universities, and who were perpetually talking of these seminaries as if there were no valuable knowledge to be acquired elsewhere in the world, he sometimes regretted, for the sake of being on an equal footing with them in conversation, that he had not fagged or been fagged by some of them at Eton, nor joined in their boasted bacchanalian exploits at Oxford; but he felt that he had amassed a greater stock

art among his teachers. He began his career as a member of the Whig party, which was then in the Opposition. From the outset he energetically demanded parliamentary reform, and after having forced the Tory government to make concession after concession, he, in 1830, entered office as Paymaster of the Forces in the Whig administration of Earl Grey, an administration which was pledged to carry parliamentary reform. Early in the year 1831 he introduced the Reform Bill to the House, and after a debate of almost unparalleled violence, its provisions were carried, on the second reading, by a majority of one; but upon the subsequent motion for going into committee, it was thrown out by a majority of eight. The ministry of Earl Grey thereupon appealed to the country, to which a most energetic and decided response was given. After the general election a new Parliament met, the Reform Bill was once more introduced, and was passed triumphantly. It became a law in 1832. Lord John was the leader of the Whig party in the House of Commons after 1834, and was appointed Secretary for the Home Department by Lord Melbourne in April, 1835. He became Minister of Foreign Affairs in 1859, and was raised to the peerage as Earl Russell in 1861. He succeeded Palmerston as Premier in 1865, but resigned in 1866 in consequence of the opposition shown to his new Reform Bill. Born in 1792.—*Bielon's Biog. Dict.*



CHARLES EDWARD, THE YOUNG PRETENDER.



of valuable knowledge than most of them, and that, having lived with those who like himself were a little pinched by penury, he had acquired habits of reflection, of self-denial, and of persevering industry which would enable him to outstrip those who for the present superciliously affected a superiority over him.

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After entering as a student at the Temple, notwithstanding his high veneration for the memory of his grandfather, the Puritan pastor, he joined in communion with the Episcopalians, being of opinion that forms of ecclesiastical government were left by our Blessed Saviour to be adapted to the exigencies of different societies, and that the enlightened and tolerant Church of England, respected and beloved by the great majority of the inhabitants of this country, was then to be preferred to the Presbyterian persuasion, which had fallen off both from the orthodoxy and the learning which had distinguished it in the times of Calamy and Baxter.¹

May 8,
1719.

He joins
in com-
munion
with the
Episco-
palians.

Having been called to the bar by the Society of the Middle Temple, he soon afterwards transferred himself to Lincoln's Inn. In due time he was elected a Bencher and Treasurer of this Society, and he became much attached to it.² Although from his first start he was always advancing, so noiseless was the tenor of his way that we read little more respecting him till he was about to be appointed a law officer of the Crown. His rise was chiefly to be ascribed to the friendship of Lord King,³ who, like him, was the son of a tradesman,

July 8,
1725.
He is
called to
the bar.

1. The English Presbyterians were then passing through Arianism to the Socinianism or Rationalism which they reached about the middle of the 18th century.

2. It appears from the books of Lincoln's Inn, that he was admitted of that Society, Jan. 26, 1725; invited to the Bench, Jan. 23, 1733; elected Treasurer, Nov. 28, 1734; and made Master of the Library, Nov. 28, 1735. The last council he attended was on Feb. 12, 1754.

3. Peter King, Lord King. The career of this eminent judge affords another striking instance of how genius and industry may overcome the

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had studied at Leyden, had been brought up among Dissenters, and, taking to the profession of the law, had conformed to the Established Church. By this powerful patron he was introduced to Sir Robert Walpole, who had the sagacity to discover his serviceable merit, and resolved to employ him.

Accordingly, in the move which took place on the

most unpromising beginnings, and, when united with modesty and good conduct, may raise the possessor from a subordinate position to the highest dignity in the state. Peter King's father, Jerome King, was a thriving and respectable grocer and salter in Exeter, and he himself was compelled reluctantly to pursue the same business for some years. His mother was Anne, daughter of Peter Locke, of a Somersetshire family, and first cousin of the great philosopher John Locke. He was born in 1669, and after receiving the ordinary education at the grammar-school of his native city, he had no other apparent prospect than was opened to him by his father's trade. Though faithfully and diligently discharging the duties of this unattractive avocation, his mind, which was serious and contemplative, sought more congenial employment, and instead of occupying his leisure hours in the usual amusements of youth, he devoted them to literary pursuits. Encouraged by his celebrated relative, who saw with surprise and pleasure the progress in learning of one who could command so few opportunities for study, he published anonymously in 1691 a work suggested to him by the discussions in Parliament on the scheme of Comprehension, which about that time agitated the religious world. This was entitled an "Enquiry into the Constitution, Discipline, Unity, and Worship of the Primitive Church that flourished within the first 300 years after Christ : faithfully collected out of the extant writings of those ages." He soon afterwards produced a second part, leading to a correspondence between him and Mr. Ellis, which was published by the latter. In 1702 he issued another theological work, called "The History of the Apostles' Creed," which greatly increased his reputation. Bred up among Dissenters, he had in his first work naturally advocated the claims of the Presbyterians ; but when Mr. Selater's book called "Original Draught of the Primitive Church" appeared, so late as 1717, he is said to have acknowledged that his principal arguments had been satisfactorily confuted. However this may have been, his early work attracted the notice of the learned world, and it displayed such an extent of reading and research that his relative induced his father to release him from his commercial engagements, and, by sending him to complete his education at the University of Leyden, prepare him for a position more suitable to his talents. He resided at Leyden for three years, and returned in 1694 and applied himself diligently to the study of the law at the Middle Temple, where he was called to the bar on June 8, 1698. In 1705 he received his first promotion, that of Recorder of Glastonbury, which was succeeded by his election on July 27, 1708, to the Recordship of London, and his knighthood in the following September. At this time his

promotion of Talbot and Yorke to be Chancellor and Chief Justice of the King's Bench, Ryder was made Solicitor General.

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He is made
Solicitor
General.
Nov. 1733.

I do not recollect any lawyer of great eminence whose early career presents such a blank. There is no tradition of any great speech by which he forced himself into business, or of any vicissitudes of good or

reputation was so high that he was designed for Speaker of the new Parliament; but his claims were withdrawn in favor of Sir Richard Onslow. He was one of the managers for the Commons in the impeachment of Dr. Sacheverell in 1710, and opened the second article in a most elaborate speech, replying also to the doctor's defence in one as able and as long. In these orations he displayed all his theological learning; but he could not effectively support a prosecution like this, which itself in some measure contravened the principles of that toleration which he had advocated. This however was a party affair, in which he probably was compelled to assist; but he soon after showed his adherence to his old opinions by his energetic defence of Whiston and of Fleetwood, Bishop of St. Asaph. (*State Trials*, xv. 134, 418, 703; *Parl. Hist.* vi. 1155.) When George I. came to the throne the Whigs regained their power, and Sir Peter was at once promoted. From the Whig leader in the House of Commons and the acknowledged head of the bar, though undignified with office, he was raised on Nov. 14, 1714, to the post of Chief Justice of the Common Pleas, in which he sat for more than ten years, with the approbation of lawyers for his learning, and of suitors for his impartiality. The "State Trials" report only two criminal trials before him; and in both of them his summing up of the evidence and his statement of the law are most careful, clear, and distinct; and though his construction of the Coventry Act in that of Woodburn and Cope did not meet with universal acquiescence, it was agreed on all sides that the prisoners were most deservedly condemned. (*State Trials*, xv. 1386, xvi. 74.) On the resignation of Lord Chancellor Macclesfield in January, 1725, Sir Peter King was appointed Speaker of the House of Lords; in which character he presided at the trial of that nobleman, and pronounced sentence against him on May 27. Five days after, on June 1, the Great Seal was placed in his hands as Lord Chancellor, he having three days before been raised to the peerage by the title of Baron King of Ockham in Surrey. His salary of 6,000*l.* was increased by 1,200*l.*, avowedly to compensate for the loss of the sale of certain offices in the Court of Chancery; thus in effect acknowledging that to have been theretofore a recognized privilege, for the exercise of which Lord Macclesfield had been punished. He had held the Seal for two years when George I. died; yet, though he had given his opinion on the subject of the marriage and education of the royal family in favor of that King's prerogative, and against the claim of the Prince of Wales, the latter when he came to the Crown was so convinced of his unbiassed integrity that he was continued in his high trust for the first six years of the reign. Died in 1734.—*Foss's Lives of the Judges.*

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His friend-
ship and
corres-
pondence
with
Bowes.

evil fortune which he experienced. Even when promoted to his present office, we know little of his companions or of his mode of life. One friendship he had, with Mr. Bowes, a brother barrister, who, having accompanied West, the Irish Chancellor, as secretary, was called to the bar in Ireland, and, having been successively Solicitor General, Attorney General, and Chief Baron in that island, at last himself became Irish Chancellor and an Irish peer. A constant epistolary correspondence was kept up between them. Bowes's letters are preserved, and some of them are very curious. The first which I select was written soon after his arrival, and gives an amusing account of the manners of Dublin—a city which was then as distant from London as New York now is. A lawyer is particularly struck by perceiving that, for advancing a favorite, practices were formerly permitted in our profession which with us would be reprobated, and which, if attempted, would be very injurious to the person intended to be benefited.¹

A. D. 1725.
Description
of
Dublin and
the Irish
bar in the
beginning
of the 18th
century.

“Dublin, Oct. 9, 1725.

“Dear Sir,—It is four weeks since I arrived here, in which time you might expect a tolerable account of the success of my project; but, in fact, I am as incapable of forming a judgment on that head as when I first came on shore.

“When I tell you the people here are French in all respects but their language, you will admit I ought not to depend upon general civilities. In England a man might flatter himself with success from a like reception, but here time only can disclose the event of this undertaking. I am, indeed, retained in upwards of twenty causes, the fees of which I have placed on the debtor side of my account with the Chancellor, for I consider them as compliments paid to him, and as to myself hope they will prove the means of showing me in business. Though I cannot appear in business till I am called to this bar, yet I con-

1. If it be discovered that letters have been circulated soliciting briefs for a beginner on his first circuit, he is sentenced to silence during the whole of that circuit, without any evidence of *complicity*.

stantly attend the seals, which are here opened every Thursday during the vacation, at which time the Chancellor answers petitions in public, and in that manner despatches the ordinary motion business of the Court (a method introduced for the benefit of the secretary). However, counsel are feed in all matters of consequence, by which means I have already heard most of their great men, who I can assure you, excepting one or two, would not appear so in England; but I will not as yet pretend to give the history of the profession in this kingdom, though I believe it may hereafter furnish matter for a very entertaining letter.

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Description of
Dublin and
the Irish
bar, con-
tinued.

"The Chancellor omits no opportunity to apprise the people here of his friendship for me, and by his means I have received civilities from most of the persons of distinction in this city.

"The CASTLE is the St. James's of this place, where my Lord Carteret¹ every morning plays the king and supports the character to admiration; and twice a week my Lady makes her appearance in the drawing-room, which for beauties (in proportion to their numbers) exceeds England. As to myself the Court here is more entertaining than that of England, as it is more agreeable to be one of the company than a spectator; my Lord and Lady having always done me the honor of talking with me in public.

"My present way of living is almost the reverse of what it was in England. I dress every day, visit ladies in a morning, receive compliments in form, and never stir without a chair; in short, I am frightened at my own appearance, and think I have more pretensions to the beau than man of business; but they

1. John Carteret, Earl of Granville (1690-1763), was the eldest son of George, Lord Carteret, and succeeded to this title at the age of five years. He received his education at Westminster School and Christchurch College, Oxford, and in 1711 took his seat in the House of Lords. Here he distinguished himself by his earnest support of the succession of the Hanover family, which recommended him to George I., who gave him several important places. In 1719 he was sent ambassador to Sweden, and effected the treaty between that power and Denmark. In 1721 he became Secretary of State, and in 1724 was appointed Viceroy of Ireland, where his administration, in a trying season, was generally applauded. He was again nominated to that office after the accession of George II., and governed that kingdom with great wisdom till 1730. He was the enemy of Walpole's administration, and moved, in 1741, for the removal of that minister. When this was effected, Lord Carteret became Secretary of State, and in 1744, on the death of his mother, succeeded to the titles of Viscount Carteret and Earl Granville.—*Beeton's Biog. Dict.*

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Description of
Dublin and
the Irish
bar, con-
tinued.

comfort me and say 'it is the way of the place. I have almost gone the round, and when that is over I will by degrees sink into my old way.

"The profuseness of the people in eating and drinking is most amazing, and may properly be called the *national vice*. It is no uncommon thing here for people, in a literal sense, to eat themselves out of house and home. Six dishes is the meanest table you sit down at, and entertainments have seldom less than fifteen. The wine is light and agreeable, but would not be esteemed in England; and if you go to the expense of the fullest wines you will save nothing by fetching them from this place.

"Dear sir, accept this as a first visit after long absence, where the conversation is perplexed by a variety of subjects; but I hope we shall often meet in this way, that our future familiar letters may sometimes deceive me and make me forget the distance by which I am separated from my friend.

"I am, dear sir, yours, etc.

"J. BOWES.¹

"Pray enclose your letters to me under cover to the Chancellor."

A.D. 1733.
Extracts
from
Bowes's
letters to
Ryder.

In 1733, Mr. Bowes had become Solicitor General in Ireland, and he thus addresses his old friend:

"24th September.

"I take it for granted there will be removes in the law in England before the next term, and it gives me great pleasure to hear from all hands that Mr. Ryder will be my elder brother."

This promotion having taken place, and Mr. Ryder having married on the strength of it, he received, somewhat tardily, the following congratulations from Mr. Bowes:

"Dec. 21, 1733.

"Were you sensible of the fatigue I have undergone this session of parliament, you would readily excuse my neglect in not congratulating you sooner upon your marriage, promotion, and (what more affects me) the recovery of your health. Besides, I flatter myself you want not such proofs to convince you of my regard for your welfare and prosperity."

1. This conclusion seems very cold; but at other times he says—

"Most affectionately yours."

and

"Your most affectionate and faithful friend and servant."

The next year Bowes wrote the following letter to Ryder, in reference to the custom which then prevailed of transmitting every Irish bill to London for the opinion of the English Attorney and Solicitor General before it was allowed to pass:¹

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"April 3^d, 1734. A.D. 1734.

"Yesterday put an end to our tedious and troublesome session of parliament, in which I am sorry Mr. Attorney and you had so large a share. Perhaps experience may reconcile you to Sir Edward Northey's rule, who used to say he had no farther business with Irish bills but to take care of the King's prerogative and the interest of the mother country. I heartily rejoice to hear that you have got safe through the great fatigue of this winter, and hope by the time I can see London you will be so far at leisure as to admit of an hour's chat with an old friend."

Ryder had another professional friend, Mr. Wainwright, who was sent over to Ireland as a Puisne Judge, and from whom he received the following amusing account of Irish duels and of Irish juries:

"Dublin, Aug. 3, 1733. A.D. 1733.

"Hitherto, Dublin has been, in comparison of what it is now, like London in a long vacation compared with itself when the parliament is sitting. Now the ladies flock to town, and show that there are beauties in Ireland. The Court here is very gay, and the Judges have as large a share of all public and private diversions as they please. These relish very well after a circuit of 500 miles in a very wild country where all the beautiful scenes of nature are accompanied with some horrors like the pictures of Salvator Rosa.² [After describing a gigantic race

Wainwright's
account of
Irish
judges
and juries.

1. Among the forms handed over to me when I was appointed Attorney General was one to this effect: "I hereby certify that I have perused this bill, passed by the two Houses of Parliament in Ireland, and am of opinion that it contains in it nothing repugnant to the law of England."

2. Salvator Rosa, an Italian painter, born at Aranella, near Naples, June 20, 1615; died in Rome, March 15, 1673. In early life he explored the wildest regions of Calabria, associating with banditti, in the interest of his art. After his father's death he supported the family by making drawings on primed paper, which brought his talent into notice; and he afterwards studied under Spagnoletto and Aniello Falcone. He then visited Rome, where he became celebrated not only as a painter, but also

CHAP. of peasantry he had met with in Connaught, he proceeds:]
 XXVII. These are a quiet civilized generation ; but there is a strange alacrity to push among those who are just one degree removed from the common people. These gentlemen are much given to quarrel at assizes, and one part of our business is to bind them to their good behavior. I think this noble science has left the capital, and is got now into the remote parts of the kingdom, where the fencing-masters (who ought to be transported as vagabonds) teach schools. I tried, this summer, two of the scholars for as flagrant a duel as ever came before a court. If all the jury had been by when the challenge was carried, or at the place of battle (as many spectators were), and saw each man kill his adversary, they would never have found them guilty of the murder. But I was surprised to find them persist in bringing in their verdict 'MANSLAUGHTER SE DEFENDENDO.' This they would do, that the prisoners might be free to fight again."

Hil. Tern,
 1737.
 Sir Dudley promoted to be first law officer of the Crown, when
 Ryder is Willes, the Attorney General, was made Chief Justice
 made At- of the Common Pleas.
 torney
 General.

Mr. Attorney Ryder devoted all his energies to the duties of his office, which he performed most admirably. Although a quarter of a century in the House of Commons, he never mingled in debate except to explain some point of law. Ever faithful to the prime minister for the time being, he engaged in no political intrigues, and, like the royal master whom he served, he "hated painters and poets," so that no attractive name is introduced in describing scenes in which he took a part. His energies were never called forth by any personal conflict, or any distinct complaint of his official conduct. Though the Jacobites grumbled

as a poet, musician, and actor. In 1647 he took part in the insurrection at Naples under Masaniello, after whose overthrow he fled to Rome. Incurring there the displeasure of the authorities by satirical pictures, he escaped to Florence, where he was employed in the Pitti palace ; but after some time he returned to Rome. Among his most celebrated works are the " Catiline Conspiracy," " Saul and the Witch of Endor " " Attilus Regulus," and altarpieces.—*Appl. Encyc.*, vol. xiv. p. 431.

a little, because he appeared so often against their leaders, they never attempted to charge him with the indecent bullying of former days, nor with straining the enactments of the law against them; so that his friends were not called upon to sound his praises. Hence the lasting light often struck out in the collision between the attack and defence of public men is here entirely wanting. Yet he was certainly a person of great importance in his own time; he never stirred out, even to pass between his house in Chancery Lane¹ and his villa at Streatham, without a coach-and-six, and he was the admiration or envy of two generations of lawyers.

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His great
importance
in his own
time.

A few of his performances in parliament and at the bar are commemorated by contemporary writers, and these it will be my duty shortly to notice.² Soon after he was made Attorney General he had to conduct through the House of Commons the bill to punish the city of Edinburgh for the murder of Captain Porteus; and the following speech is reported or invented for him by Dr. Johnson:

1. A little farther down Fleet Street is the entrance of *Chancery Lane*, a long winding street where the great Lord Strafford was born (1593) and where Izaak Walton, "the father of angling," lived as a London linen-draper (1627-1644). The Lane and its surrounding streets have a peculiar legal traffic of their own, and abound in wig-makers, strong-box makers, and law stationers and booksellers. In former times when the Inns of Court were more like colleges at Oxford and Cambridge, and when the students which belonged to them lived together within their walls, dined together, and shared the same exercises and amusements, the Inns of Court always had Inns of Chancery annexed to them. These were houses where the younger students underwent a course of preparation for the greater freedom of the colleges of the Inns of Court, to which, says Jeaffreson, in his "Book about Lawyers," they bore much the same position as Eton bears towards King's College at Cambridge, or Winchester to New College at Oxford. Now the Inns of Chancery are comparative solitudes: readers of Dickens will recollect the vivid descriptions of Symond's Inn in "Bleak House."—*Hare's Walks in London*, vol. i. p. 78.

2. He sat for Tiverton, and established an interest in this borough which gave his family the command of it till the passing of the Reform Bill in 1832.

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His speech
for the bill
to dis-
franchise
the city of
Edin-
burgh.

"Sir, the bill now before us I will venture to say is a bill that at this juncture must greatly contribute to the peace and tranquillity of this nation. The spirit of disaffection and riot seems to have gone abroad; and if a timely and effectual stop is not put to it by a vigorous interposition of the legislature, no gentleman can be bold enough to say where it may stop. In the chief city of one part of the United Kingdom it has already left too many proofs of its fatal tendency, and how soon it may communicate itself to the other I tremble to imagine. The Upper House, sir, has already set us the example in what manner we ought to treat, and in what manner we ought to punish, such unheard-of insolence and barbarity. I hope, sir, we never shall be upbraided with being cold in seconding their zeal; I hope, sir, that it never shall be laid to the charge of a British House of Commons that it has been remiss in resenting an insult upon all law and majesty, while British Peers have been forward in vindicating both. It is true that the charge against the provost and citizens of Edinburgh consists chiefly in their neglecting to prevent the tumult before it happened; in their neglecting to suppress it after it had happened; and in their neglecting to discover, apprehend, and secure those who were guilty of an audacious riot and of a cruel murder. But this charge which is the foundation of the bill is not to be considered as negligence only; for he who does not prevent a crime which he might and ought to have prevented, has always in law been looked upon as morally and legally guilty of that very crime. But it has been proved that the magistrates and citizens of Edinburgh might and ought to have prevented this insurrection, might and ought to have suppressed it, and might and ought to have discovered, apprehended, and secured the rioters and murderers. Therefore, they are answerable for the crimes which have been committed; and the punishment to be inflicted upon them by this bill is mild and merciful."

How the
bill ended.

Nevertheless the resistance to it was so great, that all the stringent clauses which it contained were struck out, and it ended in imposing a fine for the benefit of Captain Porteus's widow, who had been promoted from presiding in his kitchen to preside at his table; "so that it merely converted a poor cook-maid into a rich lady."¹

1. 10 Parl. Hist. 274.

In a debate on the question whether the House of Commons should proceed in a summary manner to punish by its own authority the printer of a libel, or should direct him to be brought to trial before a jury, Mr. Attorney General Ryder said,—

“Sir, whence so much tenderness can arise for an offender of this kind I am at a loss to discover; nor am I able to discover any argument that can be produced for exempting from instant punishment the printer of a paper which has already been determined by a vote of this House to be a scandalous libel tending to promote sedition. It has, indeed, been agreed, that there are contained in the paper some true propositions, and some passages innocent, nay, rational and seasonable. But this, sir, is nothing more than to say, that the paper, flagitious as it is, might have been swelled to a greater degree of impudence and scurrility; that what is already too heinous to be borne, might by greater virulence become more enormous. If no wickedness, sir, is to be checked till it has attained the greatest height at which it can possibly arrive, our courts of criminal judicature may be shut up as useless; and if a few innocent paragraphs will palliate a libel, treason may be written and dispersed without danger or restraint; for what libel was ever so crowded with sedition, that a few periods might not have been selected which, upon this principle, might have secured it from censure? This paper was circulated among the representatives of the people as they entered this House, under the specious pretence of giving them useful information; but the danger of preventing intelligence from being offered to us does not alarm me with any apprehensions of disadvantage to the nation, for I have not so mean an opinion of the wisdom of this assembly as to suppose that it requires such aids from officious instructors, who ought, in my opinion, sir, rather to be taught by some parliamentary censure to know their own station, than to be encouraged to neglect their proper employments for the sake of directing their governors. When bills, sir, are depending by which either the interest of the nation or of particular men may be thought to be endangered, it is, indeed, the incontestable right of every Briton to present his petition at the bar of this House, and to specify the reasons on which it is founded. This is a privilege of an inalienable kind, which is never to be denied or infringed; and this may always be sup-

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A.D. 1749.

His speech
in support
of a motion
in the
House of
Commons
for the
summary
punish-
ment of a
libeller.

CHAP. XXVII. ported without encouraging anonymous intelligence, or receiving such papers as the authors of them are afraid or ashamed to own, and which they, therefore, employ meaner hands to distribute."

The parties were summoned to the bar, and committed for a breach of privilege.¹

A.D. 1741. A bill having been brought in "for the better manning of the Navy," which gave very objectionable powers to justices of peace to authorize the impressing of seamen² by constables, it met with strong oppo-

1. 11 Parl. Hist. 587.

2. The practice of impressment, or compelling men to serve in the navy, seems to date back to a very early period of our history. It is said to have been in full force in the reign of John, that is, from the time of almost the first English king who was possessed of a regular royal fleet. Towards the end of the same century we find Edward I. empowering William Leybourne to *impress* men, vessels, and arms for the manning of his fleet. So, too, we read in the Black Book of the Admiralty that if a mariner who had been pressed for the King's naval service ran away he should undergo a year's imprisonment. The same penalty for the same offence may be traced in the legislation of later sovereigns, Richard II. (1378), Henry VI. (1439), and Elizabeth (1562-63), showing that this method of manning the royal vessels was in full force during these centuries. Towards the middle of the sixteenth century we come across what seems to be a serious attempt to make it criminal for a man to take steps for eluding impressment. In 1555 (2 & 3 Philip and Mary, xvi. 6) a very harsh law was passed against the Thames bargemen, according to which, if any watermen "shall willingly, voluntarily, and obstinately hyde themselves in the tyme of prestying into secret places and out corners," they should suffer a fortnight's imprisonment and be debarred from following their calling for another year. A more generous enactment some seven or eight years later (1562-63) attempted to restrain the arbitrary character of impressments by enjoining that "no Fisherman haunting the sea should be taken by the Queen's commission to serve her Highness as a mariner on the sea," without the commissioners having first consulted two neighboring justices of the peace. Still more indulgent was the spirit displayed in the 7 & 8 William III., according to which the Lord High Admiral is empowered to grant letters "to any landsmen desirous to apply themselves to the sea services and to serve in Merchant shippes, which shall be to them a protection against being impressed for the space of two years or more." The provisions of the act of 1555, with somewhat altered details and increased penalties, however, were reenacted after a lapse of one hundred and fifty years under Queen Anne (1705). Under George II. the impressment question was once more taken up and its stringency modified (1739-40). By a statute passed in this reign it was decreed that all persons above fifty-five and under eighteen years of age should be exempt from impressment; and an attempt to encourage

sition; some members denying the right of impressment altogether, and proposing that bounties should be given to induce the voluntary enlistment of seamen in the navy :

Mr. Attorney General Ryder: "Sir, the practice of impressing, which has been declaimed against with such vehement exaggerations, is not only founded on immemorial custom which makes it part of the common law, but is likewise established by our statutes. Why is it, therefore, to be considered illegal or unconstitutional? Upon an emergency, all must serve by land as well as by sea; and when the royal standard is erected in the field, all the King's subjects are bound to repair to it and to fight under it. This practice, which is as old as the constitution, may be revived at pleasure, and rests on the same foundation as the impressment of seamen. The safety of the state is the supreme law, which must be obeyed. As to the proposed bounties, they would be wholly ineffectual, impressment must still continue, the apparent hardships of the system would be aggravated, and you would have a much less powerful navy at a much greater cost to the state."

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His speech
in favor of
impress-
ment.

However, Sir Robert Walpole, seeing that the measure was so unpopular that it might precipitate his downfall, wisely abandoned it; and although a bill passed "for the better manning of the Navy," all the obnoxious clauses were withdrawn from it.¹

The
measure
aban-
doned.

When Prince Charles Edward was about to engage in his chivalrous expedition, which for a time promised so favorably, and which terminated so disastrously, Mr. Attorney General Ryder introduced into the

A.D. 1744.
He intro-
duces a bill
for sus-
pending
the Habeas
Corpus
Act.

men to adopt a sailor's life was made at the same time by a clause which granted freedom from the above liability to all sailors who chose to demand it, for two years from the time of their first going to sea. An act of William IV.'s reign improved the position of the impressed sailor still further by limiting his term of service to five years—unless in a case of urgent necessity, when the admiral might enlarge it by six months (1835). By this time, however, the practice of impressment, which had been very largely used during the great wars in the opening years of the century, had been rapidly losing ground, and its place is now altogether supplied by voluntary enlistment.—*Low and Pulling's Dict. of Eng. Hist.*

1. 12 Parl. Hist. 26-143.

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House of Commons the bill for suspending the *Habeas Corpus Act*.¹ But we are only told that, "after enlarg-

1. The Writ of Habeas Corpus rests upon the famous 29th section of Magna Charta: "No freeman shall be taken and imprisoned unless by the lawful judgment of his peers or by the law of the land." Arbitrary imprisonment, though thus provided against, was, however, not unfrequently practised by the King's Privy Council, and in 1352 a statute was passed to prevent this abuse of the liberty of the subject, which was twice reënacted in the reign of Edward III. Under the Tudors, prisoners, when committed by the Council generally, or even by the special command of the King, were admitted to bail on their habeas corpus, but there were frequent delays in obtaining the writ. The question whether a prisoner could be detained by special command of the King, signified by a warrant of the Privy Council, without showing cause of imprisonment, was argued out in Darnell's case, when the Judges, relying upon an obscure declaration of their predecessors in the 34th of Elizabeth, decided for the Crown. The House of Commons retorted by protesting in the Petition of Right against the illegal imprisonment of the subject without cause. The arbitrary arrest of Sir John Eliot and the other members on the dissolution of 1629 was an attempt to evade the Petition of Right, and was met by the provision, in the act which abolished the Star Chamber, that any person committed by the Council or the King's special command was to have a writ of habeas corpus granted him, on application to the Judges of the King's Bench or Common Pleas, without any delay or pretence whatever. Nevertheless, Lord Clarendon's arbitrary custom of imprisoning offenders in distant places revived the grievance, and the Commons, under Charles II., carried several bills to prevent the refusal of the writ of habeas corpus, but they were thrown out in the Lords. In 1676 Jenkes's case called fresh attention to the injustice of protracted imprisonment. At last, in 1679, the famous Habeas Corpus Act was passed. It enacted that any judge must grant the writ of habeas corpus when applied for, under penalty of a fine of 500*l.*; that the delay in executing it must not exceed twenty days; that any officer or keeper neglecting to deliver a copy of the warrant of commitment, or shifting the prisoner without cause to another custody, shall be fined 100*l.* on the first offence, and 200*l.*, with dismissal, for the second; that no person once delivered by habeas corpus shall be recommitted for the same offence; that every person committed for treason or felony is to be tried at the next assizes, unless the Crown witnesses cannot be produced at that time; and that, if not indicted at the second assizes or sessions, he may be discharged; and that no one may be imprisoned out of England. The defects in this great act have since been remedied by the Bill of Rights, which declares that excessive bail may not be required; and by the act of 1757 "for securing more effectually the liberty of the subject," which extended the remedies of the Habeas Corpus Act to non-criminal charges, and empowered the Judges to examine the truth of the facts set forth in the return. By an act of 1862, based on the fugitive slave Anderson's case, it was provided that no writ of habeas corpus could issue from an English Court into any colony where local courts exist having authority to grant and issue the said writ. The Habeas Corpus Act was extended to Ireland in

ing on the present dangerous situation of affairs in this country, when not only a foreign invasion but domestic troubles were to be provided against, he said, that, fully convinced as he was of the importance of that invaluable law for the preservation of our liberties, he should as soon have cut off his right hand as stand up to make that motion, if he were not fully persuaded that it was absolutely necessary to secure all the invaluable blessings which we enjoyed."¹

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His greatest effort seems to have been his defence of Lord Hardwicke's bill attainting the sons of the Pretender should they land in Great Britain or Ireland; making it high treason to correspond with them, and postponing till their death the mitigation of the English law of treason introduced at the Union for doing away with corruption of blood in all cases of high treason. Not only Jacobites, who looked eagerly for a restoration of the true line, but Whigs, who had assisted in effecting the Revolution and sincerely supported the new dynasty as necessary to constitutional government, were shocked by the proposed enactment that the young Princes, the undoubted heirs of Cerdic the Saxon, of William the Conqueror, of the Plantagenets whether wearing the white rose or the red, of the Tudors, of the Bruces, and of the Stuarts,—although, personally, they had committed no offence against the British nation, and although they must have considered that they were engaged in a holy enterprise when they

Effect of
the pro-
posed en-
actment
that the
sons of the
Pretender
should be
attainted.

1782; in Scotland the liberty of the subject is guarded by the *Wrongous Imprisonment Act* of 1701. In times of political and social disturbance the Habeas Corpus Act has now and again been suspended. It was suspended nine times between the Revolution and 1745; again during the troubles which followed the French Revolution (1794–1800), after which an Act of Indemnity was passed; as again after the Suspension Act of 1817. In Ireland it has been suspended no less than six times since the Union; but since 1848 the Government, in times of disaffection, have had recourse to special Coercion Acts.—*Low and Pulling's Dict. of Eng. Hist.*

1. 13 Parl. Hist. 671.

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were trying, with the assistance of faithful adherents, to recover the crown for their exiled father,—if taken prisoners in the country which their ancestors had ruled for fifteen hundred years, should, without any form of trial, be hanged like dogs on the bough of the next convenient tree. The new treason of simply corresponding with them while they remained in distant lands was startling, as the interchanged letters might amount to mere courtesy, or might touch some point of philosophy or the arts. But the indefinite prolongation of forfeiture of all property and all honors, on a conviction for high treason, was that which caused the greatest alarm. The union with Scotland never could have been accomplished except upon the solemn promise that, if the English law of treason was introduced into that country, "corruption of blood," its most cruel incident, should entirely cease at the death of the son of James II. The new measure was denounced as not only unjust and inhuman in itself, but as the breach of a national compact, and of the condition on which the Hanoverian family had been invited to the throne.

Ryder's
speech for
their at-
tainer.

Mr. Attorney General Ryder: "Sir, the clause for attainting the two sons of the Pretender, in case they should land or attempt to land in Great Britain or any of the dominions thereunto belonging, can stand in no need of any long explanation, or of many arguments for securing to it your approbation. It is vain, sir, to talk or to think of hereditary right to the crown beyond what we find in the Act of Settlement. Our only legitimate sovereign is his Majesty King George II., to whom we have all sworn allegiance, and whom God long preserve! All who contest the right to the crown of him and his heirs, must be treated as traitors. We cannot look to the pedigree of those who compass the death of our lord the King or levy war against him in his realm. The stability of government is essential to the good of the people, and this can only be secured by speedily disposing of those who claim the crown and try to get possession of it by force of arms. On this principle the Duke of Mon-

mouth was attainted by parliament, and executed without any form of trial ; and on the same principle the present Pretender, calling himself James III., and James VIII. of Scotland, was himself attainted by act of parliament in the year 1715. Notwithstanding the attainder, no one would be justified in putting the law in force without a warrant from the Government, and there would always be room for a display of royal clemency. With respect to the prohibition of corresponding with the sons of the Pretender, I am not much surprised that there should be some uneasiness, considering how many (wishing to have two strings to their bow) ever since the flight of James II., while they professed a devoted adherence to the new order of things, have wished to keep up a good understanding with the exiled family, contemplating the possibility of a new Restoration. Ought this double-dealing to be encouraged? The courtesy to be found in such letters is the offer of a hospitable welcome in Lochaber, the philosophy discussed is the divine right of kings, and the art to be illustrated is the art of rebellion. For the good of hot-headed Jacobites and Janus¹-faced politicians themselves, such correspondence should be interdicted, that they may be saved from temptation and delivered from evil. The clause continuing the existing law of forfeiture for treason till the death of the sons of the Pretender will require some more observation, for it has been represented as inconsistent with religion, inconsistent with natural justice, inconsistent with national good faith, and inconsistent with the freedom of our constitution. All that can be said against forfeiture for treason must proceed from mistaking or misrepresenting the nature of punishment, and the end for which it has been introduced into human societies. It is said that punishment is 'malum passionis, quod infligitur ob malum actionis,'² and therefore in its own nature it must be confined to the person of the criminal ; for whoever pretends to inflict a punishment upon an innocent person, cannot properly be said to punish : on the contrary, he deserves to be punished,

1. Janus was the most ancient king who reigned in Italy. He was a native of Thessaly, and son of Apollo, according to some. He is represented with two faces, because he was acquainted with the past and the future ; or, according to others, because he was taken for the sun, who opens the day at his rising, and shuts it at his setting. Some statues represented Janus with four heads.—See Lemprière's Classical Dict.

2. "An evil of suffering, which is inflicted on account of an evil of action."

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Ryder's
speech for
their at-
tainder,
continued.

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speech for
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tainer,
continued.

because, in so doing, he commits a crime, or a 'malum actionis,' and for that reason ought to suffer a 'malum passionis.' However, there are many misfortunes, inconveniences, and losses which innocent men are subjected to by the nature of things, and may be exposed to by the laws for the preservation or welfare of society. It is a misfortune for children to be born of parents afflicted with hereditary diseases; it is a misfortune for children to be reared by parents who are poor or profligate: but these misfortunes are not to be called punishments. In countries where slavery is permitted, children born of slaves are the property of the masters of their parents. In the ancient Roman commonwealth, the children of plebeians could not marry into a patrician family, nor be advanced to any of the chief posts of the Government. In a similar category are children, by our law, born of parents convicted of treason. If the good of society requires the property of the parent to be forfeited for his crimes, his children suffer a misfortune, but are not subjected to punishment."

He then proceeds at enormous length, but with very considerable ability, to quote the opinions on this subject of Grotius, of Puffendorf, and of Cicero; and to examine the treason laws of the Jews, of the Athenians, of the Romans, of the Saxons, of the Normans, and of the English from the reign of Edward III. downwards; showing that, by the most enlightened statesmen and the wisest nations, forfeiture of

1. High treason, which means a transcendently dangerous kind of betrayal, is theoretically a murderous blow aimed at the state, but in fact is any mischievous action or design against the person of the sovereign, with whose particular life the general welfare is supposed to be bound. It is called "high" to distinguish it from simple or petty treason, which was an outrageous or unnatural betrayal of confidence, as that of a child who attempts or designs the slaughter of a parent. Feudalism is usually credited with having shifted the mark of treason from the state to the sovereign. Yet the idea of the King's supreme lordship and consequent importance in this connection is first seen in Alfred's law of treason: "If any one plot against the King's life, of himself or by harboring of exiles, or of his men, let him be liable in his life and in all that he has." For such "treachery against a lord" Alfred thought no reparation possible. After the Conquest, therefore, while the penalty of rebellion was for a Norman only forfeiture and imprisonment, for an Englishman it was death. In 1075 the Norman earl Ralph Guader met with no worse doom than loss of lands and perpetual captivity; the Englishman Wal-

property had, for the peace of society, been inflicted as a punishment on those who had attempted to overturn

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theof perished on the scaffold. The crime did not assume its darker aspect, or draw after it the more awful punishment afterwards reserved for it, till many years later. The Norman and early Plantagenet kings seldom, if ever, had leaders of rebellion executed on legal process; their vengeance was satisfied with the ordinary feudal consequences. The idea of treason, however, was well known. Glanville speaks of it under the name of "lese majesty," thus showing the influence of the Roman law on its development. Edward I. gave expression, perhaps for the first time, to the sterner conception of the offence; the proceedings against David of Wales and William Wallace first exhibited its merciless characteristics. The constructive complexity of David's guilt set the precedent for the most appalling feature in our legal history. He was drawn to the gallows, hanged, had his bowels burnt, and his quarters dispersed over the kingdom, respectively for the treachery to his lord, the murder, the profanation of a holy season, and the repeated formation of designs against his King at various places, into which the Judges divided his crime. His case practically ruled all that came after. The hurdle, the gallows, the axe, and the quartering knife were for ages the instruments of the punishment of treason, varied only by the stake and the fagot if the convicted traitor were a woman. The legal sentiment was now fostered that there was a special heinousness in the offence. It was deemed politic, perhaps, to frighten the King's liegemen into a respect for their oaths and implied fealty. Any scheme that struck at the King, his crown and dignity, or tended to do mischief to his person or royal estate, was asserted by legal writers to be treason, not only in those who attempted it, but also in those who advised it. But the Crown had the interest in keeping the offence indefinite that the consequent frequency of forfeitures gave; and the profitable vagueness was allowed to hang over it for a time. Mortimer, for instance, was in 1330 condemned for merely "accreoching" or drawing towards himself the royal power. In 1352, therefore, the puzzled and distressed Lords and Commons begged King Edward III. to declare authoritatively the law on the subject. Edward complied, and the historic Statute of Treasons was the result. Henceforward no man was to be held guilty of treason who had not compassed the death of the King, Queen, or their eldest son; violated the Queen, the King's eldest daughter if unmarried, or the wife of his eldest son; levied war against the King in his kingdom, or adhered to his enemies; counterfeited the Great Seal, or brought false money into the land; or slain his Chancellor, Treasurer, or Judges "being in their place doing their offices." And all the lands forfeited for any of these offences were to go to the King, whether holden of him or of others. The weightier clauses of this statute are law still. But it often fell short of the needs of an arbitrary King or an unusually critical condition of affairs; and such additions were made to it by the legislature, and constructions placed upon it by the Judges, as the occasion seemed to demand. In Richard II.'s heyday of power, in Henry VI.'s growing weakness, new treasons were created, but only to be brushed away at the

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the existing government, whether monarchical, aristocratical, or mixed; and the love of parents to children had been taken advantage of to deter men from crimes

return of better or more settled times. The reign most prolific of artificial treasons was Henry VIII.'s: to deny the royal supremacy, or even decline to admit it, to deprive the King of any of his titles, to keep back from him the knowledge of an immorality committed by the lady he proposed to marry, and several other things of little seeming importance at other times, were exaggerated into treasons. These were all swept away when Edward VI. succeeded; but many of them were reënacted the year before his death, while, as a feeble antidote to this renewed severity, it was provided that no treason should be established save on the testimony of two witnesses. The restored additions were cast out again in Mary's reign, but the mitigatory provision was left untouched. The safety of Elizabeth called for fresh accessions to the law,—among other enactments it was made treason to say that the Queen was a heretic, a schismatic, or a usurper,—but these were limited to the Queen's lifetime. After her death the law of Edward III. continued the sole statutory basis of the crime, and the law of Edward VI. its sole judicial corrective. The nimble wits of lawyers, however, had found in the former, by help of the doctrine of constructive treason, more than one implication of crime. Chief among these was conspiracy to levy war against the King, which though not asserted to be itself treason, was accepted as a convincing proof of treason. To this principle Parliament also three times gave a lease of the existing sovereign's life, in the reigns of Elizabeth, Charles II., and George III. The contemplated deposition of the sovereign, or even the devisal of a plan for putting him under restraint for any purpose whatever, such as Essex designed in 1601, was discovered in Edward III.'s statute. At last, in 1816, the whole subject was comprehensively treated in a statute of that year, which is now the accepted standard of treason. By this measure not only the overt act, but the mere entertainment of a desire to slay, wound, coerce, or depose the King, or to deprive him of any part of his dominions, or to levy war against him with any view whatever, or to move an invasion from abroad, and the publication of an intention to do any of these things, were declared to be high treason. The law was thus definitely fixed. No legal process was more shamelessly perverted to tyrannical and unjust ends than that of treason, as a hundred cases, from *Burdett's* to *Sidney's*, testify. To remedy the monstrous unfairness of trials on this charge the notable law of 1696 was passed. This insures to the accused the assistance of counsel, the examination of his witnesses on oath, a copy of his indictment five (afterwards ten) days, a list of the jury panel two days, before his trial, and the certainty of having two direct witnesses produced against him; and limits prosecutions to the term of three years, save for an attempt to assassinate the King. The revolting horrors of the punishment have since been removed—the cutting down alive and disembowelling of men, and the burning of women, in 1790: the drawing, quartering, and beheading, in 1870. But they had ceased to be carried out much earlier.—*Low and Pulis's Dict. of Eng. Hist.*

which are subversive of social order, and to which there is often a strong inducement from ambition, cupidity, and love of change. He thus concluded :

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"The execution of a traitor is a fleeting example ; but the poverty of his posterity is a permanent lesson of obedience to the laws, whereby rebellion and civil war are prevented, and liberty is allowed to flourish. The reason which induced Parliament to continue forfeiture for treason in this country, at all events till the death of the old Pretender, applies now with equal strength to continue it till the death of his sons. The infatuated attachment to the family which systematically attacked, and which if recalled would soon effectively destroy, both our religion and our liberties, still continues ; and wicked men, under pretence of it, seek to prosecute their own schemes of lawless aggrandizement. Whether we shall ever abolish a punishment so salutary and necessary, there is no occasion now to determine ; but, at all events, while the Pretender's sons survive, there will always be too many amongst us affected by an itch of rebellion ; and all lawyers and politicians agree, that severity of punishment should be in proportion to the evils arising from the offence, and the probability of its being repeated."¹

its conclusion.

The bill passed ; but it had no effect in deterring Charles Edward from his purpose, or in cooling the ardor of his followers ; and as wise men preferred the existing system of government, from the superior advantages enjoyed under it, I suspect that the more prudent course would have been, by amending our laws, to have removed the unpopularity from the Government,—which was then so great that the mass of the nation looked with indifference to the result of the contest.

The bill passes.

The next speech of Mr. Attorney General Ryder transmitted to us is an extremely elaborate one, which he delivered against a bill introduced to prohibit insurances on French ships during the war. Carrying the principles of free trade to an extreme which

A.D. 1747.
Ryder's speech to prove the expediency of allowing the insurance of enemies' ships.

1. 13 Parl. Hist. 889.

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startles us even in the present age, he contended that we should be gainers by indemnifying French merchants against English capture; and this proposition he enforced and illustrated by an immense body of statistics and calculations, which would now be uninteresting. Having shown the large profit made by insuring enemies' property, he pointed out the imprudence of sacrificing this in the vain hope of destroying their commerce:

"Like the dog in the fable," said he, "by snatching at the bone we fancy we see in the water, we shall lose that which we now hold in our mouth. The trade of insuring we possess without a rival; but it will soon be established in other countries, and our own merchants may deal with foreign insurance-companies. Let the King of France but talk of insurances in his drawing-room; let him but say it is a business no way inconsistent with noblesse; let him but insinuate that he will show favor to those who engage in it, and the whole French nation will become insurers."

The bill prohibiting such insurances nevertheless passes.

However, although he was ably supported by Murray the Solicitor General, the bill passed; and, indeed, our courts would now consider such insurances void at common law, as contracts with alien enemies, and contrary to public policy.¹

On the death of Frederick, Prince of Wales,² Mr.

1. 14 Parl. Hist. 128.

2. Frederick, Prince of Wales (1707-1751), was the son of George II. and Caroline of Anspach. Before coming to England he quarrelled with his father because his intended marriage with Princess Wilhelmina of Prussia was broken off. On his arrival in England he joined the party that was in opposition to Walpole, taking Bolingbroke as his political adviser. He continued to oppose the Court and ministry until his death. —*Low and Pulling's Dict. of Eng. Hist.*—Hare says: "Frederick, Prince of Wales, when he, in his turn, quarrelled with his father in 1737, came to reside in Leicester Square with his wife and children. It was there that he died (March 20, 1751), suddenly exclaiming, 'Je sens la mort,' and falling into the arms of Desnoyers, the dancing-master, who was performing upon the violin, while the royal family were playing at cards in the next room; an event which so little affected George II., that when he received the news as he was playing at cards with the Countess of Walmoden, he said simply, 'Fritz ist todt,' and went on with the game."—*Walks in London*, vol. ii. p. 126.

Attorney Ryder had to carry through the House of Commons the bill for appointing the Princess of Wales Regent, with a Council to control her, at the head of which was the Duke of Cumberland. This last part of the arrangement was very unpopular, and he had great difficulty in defending it. Having observed that the precedent now established would settle the practice of the constitution for the future, he thus proceeded:

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A.D. 1751.
Ryder's
speech on
the Re-
gency Bill.

"I shall freely grant, sir, that a sole regent, with sovereign power, is more consonant to our constitution, and less exposed to faction, than a regent limited and restrained to act in all matters of great importance by the advice of a council of regency; but will any gentleman say that the appointing of a sole regent with sovereign power ought to be laid down as a general rule to be observed in every case of a minority? If we appoint a regent with a council of regency, we are exposed to the danger of faction; if we appoint a sole regent with absolute power, we are exposed to the danger of an usurpation. But as usurpation is a danger much more terrible than faction, the safer general rule is, that a council of regency ought to be established, and that the regent be confined to act by their advice." He then went over the various minorities which had occurred in English history since the accession of Henry III., illustrating his proposition by the manner in which a limited and unlimited regency had worked; and thus concluded: "If a sole regent with sovereign power should now be appointed, I am persuaded the same course will ever after be insisted upon, till some regent, like Richard III., has convinced us when it is too late of the danger we incur. If I were to look no farther than the excellent Princess named by this bill, I would cheerfully intrust her with absolute sway; but I am sure she has too much wisdom not to excuse our refusing to pay her a compliment at the apparent risk of one of her posterity."

The bill passed as introduced, but never came into operation, as George II. survived till his grandson was of age.¹ The bill
passes.

1. 14 Parl. Hist. 1023.

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XXVII.
A.D. 1753.
His speech
in support
of Lord
Hard-
wicke's
Marriage
Bill.

The last time that Sir Dudley Ryder ever spoke in parliament was in supporting Lord Hardwicke's celebrated bill "to prevent clandestine marriages."¹ He showed at great length, and with much ability, the evils produced by the existing system of giving validity to every marriage celebrated by a priest in orders, in any place, at any hour, without license or proclamation of banns, and without the consent of parents or guardians; he proved that it was within the just power of the legislature to regulate the manner in which this, the most important of all contracts, shall be entered into; and he defended the several provisions of the bill which were to guard alike against the passions both of the young and the old:

"We often find," said he, "the passion called *love* triumphing over the duty of children to their parents; and, on the other hand, we sometimes find the passions of *pride* and *avarice* triumphing over the duty of parents to their children. I am persuaded that our ancestors would long ago have applied a similar remedy, but for the superstitious opinion that when a marriage between two persons come to the age of consent, though minors, is once solemnized by a priest in orders, it is so firmly established by the Divine Law, that it cannot be declared null by any human tribunal. Thank God! we have, in this age, got over such dogmas; and the Right Reverend Bench in the other House deserve well of their country for consenting to render Christianity consistent with common-sense."

The bill is
carried.

After a furious opposition, the bill was carried; but Mr. Attorney ought to have seen a gross defect in it, which we have lately cured,—that it allowed the validity of marriages to be questioned at any distance of time upon an alleged non-compliance with its provisions, although the parties might have lived many

1. The act commonly called Lord Hardwicke's Act (1753) provided that marriages must be performed in the parish church (those of Jews and Quakers alone being excepted) after the publication of banns, or by special license granted by the archbishop. Any clergyman breaking these restrictions was liable to transportation for seven years.—*Low and Pulling's Dict. of Eng. Hist.*



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years together as man and wife after they had come of age.¹ CHAP.
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It must be acknowledged that Ryder's parliamentary career was not brilliant, but he deserves the praise of never having affected what he could not accomplish, and of having, without envy or jealousy, confined himself to professional subjects, while Murray, his inferior officer, was the ministerial leader in the House of Commons, and was contesting the palm of eloquence with the elder Pitt. The praise due to Ryder's parliamentary career.

In the courts of justice, Sir Dudley Ryder, as Solicitor and Attorney, did the business of the Crown very efficiently; but, with the exception of the trials which arose out of the rebellion of 1745, he was not engaged in any of permanent interest. In addressing the jury he studied brevity to a degree which astonishes us, accustomed to the long-winded orations of modern times. The following is the whole of his speech (as taken by a shorthand writer) in opening the important prosecution for high treason against Colonel Townley, who had proclaimed the Pretender in Lancashire, and had commanded a regiment of horse in his service: His efficiency in the courts of justice.
A.D. 1746.

“My Lords, and you, Gentlemen of the Jury: The prisoner at the bar, having been deeply engaged in the late unnatural and wicked rebellion, begun in Scotland, and carried into the heart of this kingdom, in order to overset our present happy constitution in church and state, hath rendered necessary this prosecution against him. I do not doubt but that, in the course of our evidence, we shall make it appear to your satisfaction that the prisoner, with others his confederates, did assemble in a warlike manner, and procured arms, ammunition, and other instruments of war, and composed a regiment for the service of the Pretender to these realms, to wage war against his present most sacred Majesty, and did march through and invade several parts of this kingdom, and unlawfully did seize his His prosecution of Colonel Townley for high treasons

1. 15 Parl. Hist. 1.

CHAP. XXVII. Majesty's treasure in many places, for the service of their villanous cause, and took away the horses, and other goods, merchandise, and chattels of many of his Majesty's peaceable subjects; and that, during the said march, the prisoner, with other rebels, in open defiance of his Majesty's undoubted right and title to the crown of these realms, frequently caused the Pretender's son to be proclaimed in a public and solemn manner as regent of these realms, and himself marched at the head of a pretended regiment, which they called 'the Manchester regiment.' My Lords, I shall not take up the time of the Court in saying a great deal, for all that the prisoner is charged with will appear so full and plain, from the evidence we shall produce for the King, that there will not be the least doubt with the jury to find him guilty."

The prisoner's counsel, in stating the defence, that he had acted under a commission from the King of France, "acknowledged that the Attorney General had opened the case with all the candor that could be expected, and had not exaggerated the charge beyond the bounds of humanity and good nature." The trial, which nowadays would last a week at least, was all over in a few hours.¹

On the impeachment of Lord Lovat, the conduct of the prosecution before the House of Lords chiefly fell on Sir Dudley Ryder, as one of the managers for the Commons. In opening the case, he distributed the facts under three heads: "1. Those which happened precedent to the Pretender's sons' landing: 2. What happened after that time, and before the battle of Culloden:" 3. What arose since that happy event:"

His speech
on the im-
peachment
of Lord
Lovat.

"The first," said he, "will disclose to your Lordships a wicked and traitorous scheme, begun and carried on for many years, for bringing over the Pretender by the assistance of a

1. 18 St. Tr. 329.

2. Culloden or Drumossie Moor was the scene of the closing effort on the part of the Stuarts to regain the English crown. The Pretender Charles Edward commanded an army of Highlanders, who were utterly defeated by the royal troops under William Augustus, Duke of Cumberland. This memorable battle was fought April 16, 1746.

foreign force, in which his Lordship will appear to have had a principal hand. The second will include the more immediate scene of action in the late wicked rebellion, and the particular parts which the prisoner took in it. The third will show him in the circumstances of a defeat; and, in every part of this whole scene, he will appear plotting, associating, and supporting all the steps that were taken for subverting this happy establishment, dethroning his Majesty, and substituting a Popish Pretender in his room."

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His speech on the impeachment of Lord Lovat, continued.

He then traced the secret machinations of the Highland chiefs, guided by Lord Lovat, to restore the exiled royal family; and he gave a lively sketch of the well-known military operations, from the landing of the Pretender, till the final overthrow of his cause, showing how the prisoner, while pretending to stand by King George, had sent his clan to fight on the other side under his son, the master of Lovat. Thus he proceeded:

"I am now come, my Lords, to that last period of time—from the battle of Culloden. The prisoner was waiting, not very far off, the event of that important day. The night after, the Pretender's son came to Gortuleg, where the prisoner was, and had an interview with him. The noble Lord did not even then disavow his cause, but received him as his prince; excused his not joining him in person; and, after the tenderest embraces, parted from him as a faithful subject to a royal master. The prisoner, as well as those who had been in open arms, was obliged to fly. He knew his guilt was the same as theirs, and that he deserved the same treatment. The rebel army, and the chiefs who escaped from the battle, were now dispersed; but, on the 15th of May, a meeting was held at Mortleg, to consider what was proper to be done for their common safety. The noble prisoner at the bar met them—not as an innocent person, to advise them to lay down their arms and beg for mercy; not as a neutral person, if neutrality in the cause of our King, religion, and liberty can be attended with a less degree of guilt; but as one involved in the same common crime and calamity,—as a chief whose age and experience entitled him to the lead; and he took it. He advised them to raise a sufficient number of men to defend themselves against the King's troops till they

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His speech
on the im-
peachment
of Lord
Lovat,
continued.

could make terms for themselves; he proposed that his son should muster 400 Frasers; and, there being 35,000 louis d'or remaining of the subsidy lately received from France, a sum equal to twenty days' pay for this band was paid to his servant. When the master of Lovat, at a subsequent meeting, proposed to surrender to his Majesty, the prisoner dissuaded him from it, and reflected upon him as a person of mean spirit to think of so dishonorable an action. He himself made off, with a guard of twenty soldiers, whom he took into pay for his defence. However, he was pursued and taken by a party sent after him by the Duke of Cumberland. Being asked how he could act as he had done after all the favors he had received from the Government, he answered 'It was not against the King I acted, but the Ministry, who took away the independent company I had been trusted with. Who would have thought but that the Highland men would have carried all before them? If the young Pretender would have taken my advice, he might have laughed at the King's forces: none but a madman would have fought that day. Besides, we were in daily expectation of farther assistance from France.' When brought before Sir Edward Faulkener he did not think of denying his treason, but made the same open avowal of his motive, adding, 'I resented the loss of my independent company so much that, if Kouli Khan¹ had come, I should have been for him. Your King is merciful, and will remember the services I have formerly done to his family. I can still do greater than twenty such old heads as mine are worth. However, I am ready for any part which he may assign to me,

. . . "In utrumque paratus,
Seu versare dolos, seu certæ occumbere morti."²

"The Commons have thought this a matter worthy their

1. Nadir Shah, or Kouli Khan, a King of Persia, born in Khorassan in 1688, assassinated June 19 or 20, 1747. Having been a chief of banditti, he entered the service of Shah Tamasp II., and, having driven out the Afghans, restored him to his throne (1730), but afterwards deposed him, and usurped the sovereignty (1736). In his latter years he became capricious and cruel, finally putting whole cities to the sword on the slightest pretext. He had also grown so avaricious that the taxes levied upon the empire were intolerable. At length four noblemen, who learned that their names were in a proscribed list, broke into his tent at night, and despatched him.—*Chambers' Encyc.*, vol. vi. p. 130.

2. "Prepared for any part, either to practise deception or to yield to certain death."

interposition, and therefore have taken it into their own hands, because the prisoner has been the contriver, the promoter, and the conductor of the rebellion, so far as Providence suffered it to go. I have entered into the case so fully, that your Lordships may have the greatest of all satisfactions which judges can desire, the certainty of pronouncing a right judgment; and as to the people in general, it is of no small moment that they should be enabled to behold in one man the pernicious schemes which, for many years, have been concerting between Rome, France, and unnatural traitors at home,—that they may see the rebellion, from which they have lately so severely felt, clearly traced to its source, and be fully convinced that whilst they are themselves enjoying at their ease, and too often asleep, their religion, their liberties, and their properties, under the protection of the best of princes, and the influence of the wisest constitution ever framed, they have enemies both abroad and within their own native country who are constantly awake for the destruction of all they hold dear,—and learn this certain truth, which should be imprinted in everlasting characters on the mind of every Briton, that there is no effectual security against the determined and persevering conspiracies of those who contemn both divine and human laws but a firm and vigilant union of honest men. Any attempt to prevent, dissolve, or weaken such a union is little less than treason in its beginning, and, if not speedily crushed, it must lead to the worst that can happen to this land of liberty, the total destruction of the royal family and of the happiness we now enjoy under their benign sway.”¹

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XXVII.
His speech
on the im-
peachment
of Lord
Lovat,
continued.

In the last recorded case in which Sir Dudley Ryder appeared as an advocate, he met with a very flagrant mortification. This was the prosecution of William Owen for a libel, which the Attorney General was ordered to institute by a vote of the House of Commons, the party supposed to be libelled, in consequence of their foolish commitment of the Honorable Alexander Murray. In his opening address to the jury, he was by no means abstemious in praising his clients or in abusing their detractor:

A.D. 1753.
Signal de-
feat of Mr.
Attorney
General
and of the
House of
Commons.

“The libel,” said he, “contains charges of partiality, injus-

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Ryder's
opening
address to
the jury in
the prose-
cution of
William
Owen.

tice, barbarity, and corruption against the House of Commons, that House which is the guardian of our liberties and the protector of all we hold dear. Every one must be shocked who reads this wicked—diabolically wicked pamphlet. The Parliament has justly voted it 'a false, malicious, infamous, scandalous, and seditious libel, tending to create confusion and rebellion.' To me it is astonishing how it could enter into the mind or heart of man to write such a libel. What! shall a person appeal from the judgment of that court who are the only judges of things pertaining to themselves—I mean the House of Commons? An appeal! To whom? To a mob! Must justice be appealed from? To whom? To injustice! The writer says 'he appeals to the good people of England, particularly the inhabitants of Westminster.' The House of Commons are the good people of England, being the representatives of the people. The rest are—what? Nothing, unless it be a mob. And what can be in a mob but confusion? But the clear meaning of this libel was an appeal to violence. Gentlemen, whosoever reads this libel will find it the most pungent invective that the skill of man could invent. I will not say the skill, but the wit, art, and wicked contrivance of man, instigated by Satan. To say that this is not a libel, is to say that there is no justice, equity, or right in the world. If the House of Commons is not to be defended, and to have protection and relief in a court of law, yourselves, your homes, and your children will be without protection or relief. You will see, gentlemen, whether the evidence does not satisfy you that the libellous pamphlet was sold in the shop of the defendant; and, in that case, it will be your duty to find him guilty."

An Attorney General who should now make such a speech—denouncing the whole constituent body, or the people of England, as a mob, without any touch of reason or sense of justice—would be impeached, unless he were shut up in a madhouse. Even a century ago it seems to have given mortal offence to those to whom it was addressed. The jury, by an artful dodge, might have been wheedled out of their rights,—but they would not have been Englishmen if they had suffered themselves to be thus bullied. The sale

It gives
mortal
offence.

of the pamphlet in the defendant's shop by his authority was incontrovertibly proved; yet, although the Chief Justice fully adopted the doctrine that the jury could not look beyond this fact, they took the question of *libel or no libel* into their own hands, and, to the unspeakable delight of the public,—without condescending to answer whether they considered the evidence of *publication* sufficient,—insisted on finding a general verdict of NOT GUILTY.¹

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Mr. Attorney was afraid to face the mob assembled round Guildhall, and concealed himself in the Lord Mayor's closet. After a few hours he ventured to return to his house in Chancery Lane; but he found a great bonfire blazing in Fleet Street, and, before his hackney-coach was allowed to pass, he was obliged to give something to drink to the health of the jury;—in return for which, without knowing their benefactor, they threw to him a copy of the following song, supposed to be sung by the foreman and a chorus of jurymen, but actually composed by an Irish porter:²

"Sir Doodley, Sir Doodley, do not use us so rudely;
You look pale, as if we had *kilt* ye:
Sir Doodley, Sir Doodley, we shamefully should lye,
Were we to say the defendant is GUILTY.

Irish
porter's
song on
"Sir
Doodley."

"A fig for the Commons! Who now cares for their summons?
Or their votes on the press to make war?
Murray made them look glum once by calling them '*rum 'uns*,'
And refusing to kneel at their bar.

"Mr. Attorney's grim wig, though awfully big,
No more shall frighten the nation;
We'll write what we think, and to LIBERTY drink,
And defy his *ex-officio* INFORMATION."³

Sir Dudley Ryder had been for some years impatient for the tranquillity and security of the bench,

1. 18 St. Tr. 1203-1230: *ante*, p. 287.

2. Lond. Mag. 1753. Lord Mahon's History, iv. 27. Kneeling at the bar of the House of Commons never was heard of more.

3. I presume *ex-officio* INFORMATION.

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March,
1754.

and he was soon after thrown into deep consternation by the death of Mr. Pelham,¹ the Prime Minister, which threatened a complete dissolution of the Cabinet. After such a long and prosperous voyage, when within sight of port he suddenly found himself among breakers, and he was afraid of being cast away on the dreary shore of Opposition. The vessel righted, but he had little confidence in the new pilot, and he dreaded some fresh disaster.

April 8.

Not inopportunately for the Attorney General came the apoplexy of the Chief Justice. There was no hesitation as to the manner in which the vacancy was to be filled up; and, as soon as the necessary forms could be complied with, Sir Dudley Ryder took his seat in the Court of King's Bench, as the successor of Sir William Lee, and was made a Privy Councillor. He was sworn in privately at the house of the Lord Chancellor, the parade of installation speeches having become obsolete. It was expected that he would be immediately raised to the peerage; but Lord Hardwicke's reluctance to have any law lord in the House of Peers, besides himself, still prevailed.

May 2.
Ryder
Lord
Chief
Justice.

His judicial
career.

Lord Chief Justice Ryder's judicial career was extremely brief, being only a few days more than two years. During this period he reputably performed the duties of his office; but those who expected that he was to introduce reforms and improvements into

1. Henry Pelham, an English statesman, born in 1694, was a brother of the Duke of Newcastle. He became Paymaster of the Army in 1730, and an opponent of Walpole. On the defeat of Walpole, in 1742, he obtained the office of Chancellor of the Exchequer. A rivalry between him and Lord Carteret resulted in the removal of the latter in 1743 or 1744, after which Pelham and his brother were the chief ministers until 1754. "Henry Pelham," says Macaulay, "was by no means a contemptible person. His understanding was that of Walpole on a somewhat smaller scale. Though not a brilliant orator, he was, like his master, a good debater, a good parliamentary tactician, a good man of business. For the first time since the accession of the Stuarts, there was no Opposition." Died in 1754.—*Thomas' Biog. Dict.*

the administration of the Common Law were disappointed, for he listlessly allowed all things to go on as he found them. He had no ambition to raise his fame above that of his immediate predecessors, and he satisfied his conscience by deciding to the best of his ability the cases which came before him, according to the antiquated routine which had long been condemned. His decisions are to be found in the Reports of Sayer and Lord Kenyon; but, in looking through them, I can find none which, from the importance of the point adjudged or the mode of reasoning adopted, would now be interesting. He had not to preside at any trial for treason or libel; and he came in for no share of the popularity soon afterwards enjoyed by Camden, or of the obloquy cast upon Mansfield.

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Resentment was excited in his mind by the consideration that the rank was withheld from him which had been conferred on his predecessors, Jeffreys, Parker, and Raymond, and which his ample fortune would have so well enabled him to support. The profession took part with him; and, feeling that their consequence was impaired by the rule laid down that the Chancellor was the only lawyer who could hope to be ennobled, loudly asserted that the public suffered from there being no common-law judge permitted to sit in either Chamber of Parliament. All these complaints would have been vain if the Duke of Newcastle, now tottering to his fall, had not wished to strengthen himself by making new peers. He had been out-voted in the House of Commons on Pitt's Militia Bill, and his noble whipper-in gave him notice that neither the list of ministerialists in town nor the proxy-book was quite satisfactory. He immediately suggested the Chief Justice of the King's Bench as one new peer; and, seeing that from the moderate abilities and unambitious disposition of this individual he never

His resentment because the rank of a peer is withheld from him.

A.D. 1736.

CHAP.
XXVII.He is about
to be raised
to the
peerage.

May 24.

His sudden
death.

could be a candidate for the Chancellorship, or formidable from obtaining influence in a deliberative assembly. Lord Hardwicke did not resist the proposal. Sir Dudley, pleased that his wife was to be a BARONESS, that his children were to be *Honorable*, and that the prophecy of his grandfather was about to be fulfilled, joyfully accepted the offer, and fixed upon the title of "Lord Ryder, Baron Ryder, of Harrowby in the county of Lincoln." Accordingly, on the 24th day of May, 1756, the King signed a warrant addressed to the Attorney General, commanding him to make out a patent of peerage by this name, style, and title; and it was agreed that the following day the new peer should go to St. James's, to kiss hands on his elevation, when the dignity would have been considered as virtually conferred, although some days more were required for the patent to pass the Great Seal. Alas! amidst the felicitations of his family and his friends, he was struck that very evening with a mortal malady, and in twelve hours they were weeping over his corpse. He had reached his sixty-sixth year, but, from a good constitution and temperance, he seemed to be only entering into green old age, and a considerable period of enjoyment and of usefulness was still supposed to be before him.

We may judge of the sensation produced by this calamity from a letter of Archbishop Ryder to the widow of the Chief Justice, in which he says,—

June 4.
Letters of
Arch-
bishop
Ryder.

"A greater loss could not be to his family or his friends: few were ever so great a blessing to all that had the honor to be related to him. His kindness to me and to my nephews has been boundless: what his Majesty and the public have lost by his death will be testified by the universal lamentation of it. Whatever may be the sorrow of those who are immediately affected by it, their duty is to endeavor to overcome it: the living require this of us; and the dead, if they knew it, would grieve at our grieving for them."

A few days after, his Grace thus addressed the son of the Chief Justice : CHAP.
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"It is my duty to write to you, though I gave my lady your June 7. mother the trouble of a letter by the last post, and can now do little more than mingle my tears with the flood of sorrow which overwhelms you on account of the loss of your invaluable father. He was ever a father to me and mine in the most signal acts of affection and kindness. That he is snatched away thus suddenly, and at so critical a juncture, has the appearance of the hand of God in a very extraordinary manner, and yet the ways of God with man are unsearchable. Possibly he may have been taken from us at the time he was the ripest for the honor with which posterity will have him in remembrance. I would hope, too, that the honor intended his Lordship by his Majesty will be redoubled to him by its being renewed to you as a testimony of your father's uncommon merit, and of his long and faithful services to the Crown. However this may be, and however we may be grieved for the loss of him, we have the comfort to hope and to believe that his lot in the other world is with the children of God, and that he is numbered with the saints."

It was generally expected that the son's name would be inserted in the patent instead of the father's, and that he would forthwith be declared Lord Ryder of Harrowby; but, as he was not yet of age, he could not have voted in the critical division which was expected, and poor old Sir Dudley's "long and faithful services to the Crown" were already forgotten. Lord Hardwicke no longer felt any jealousy upon the subject, but he treated it with the coldest indifference. By the advice of some friends of the family, a memorial to the King, stating the facts of the case, was prepared; and they proposed that the young gentleman himself should be presented to his Majesty, in the hopes that on this occasion there might be a favorable announcement of the royal will. The Honorable Charles Yorke,¹ then Solicitor General, being applied

1. Charles Yorke, Lord Morden, an English jurist and statesman, born in London in December, 1722, was a younger son of the first Lord

Expectation that Sir Dudley Ryder's peerage would be conferred on his son.

CHAP. to that he might use his good offices with his father,
XXVII. wrote the following frigid reply :

June 20.
Letter on
this subject
from the
Honorable
Charles
Yorke.

"Dear Sir,—I have just seen Lord Chancellor, who is clearly of opinion that you had better defer being presented to the King till after his Majesty shall have given an answer to the memorial, and till after your coming of age, which I acquainted him will be in the beginning of next month. He thinks the memorial very properly drawn, and will present it some day next week. He is certainly your friend in it, and I wish you all possible success. If I can be of the least service to Lady Ryder or yourself, you may always command me. Nothing can exceed the respect and love which I bore your father, and the obligations which I owe to his kind friendship are such as entitle you to every return in my power.

"I am, dear Sir, with the greatest regard and esteem,

"Your affectionate and faithful servant,

"C. YORKE."

In the political crisis which arose from Murray's determination to succeed Sir Dudley Ryder, and which terminated in the resignation of the Duke of Newcastle and Lord Hardwicke, the Ryder memorial was forgotten, and for years to come the Ryder peerage was not thought of except among the members of the family. The good Archbishop, to be sure, wrote, "Possibly the change of ministry, if what is said of it be true, may have placed those at the helm who will be more desirous of serving you. The Duke of Devonshire, I am well assured, was a fast friend to the

Nov. 8.

Hardwicke. He was educated at Bene't College, Cambridge. He and his brother Philip were, while at college, the principal authors of the "Athenian Letters; or, The Correspondence of an Agent of the King of Persia residing at Athens" (1741), a work of considerable merit. He published an ingenious "Treatise on Forfeiture for Treason" (1744). He became Solicitor General in 1756, and Attorney General in 1762. He was attached to the Whig party. Having resigned in December, 1763, he was reappointed in August, 1765, on the formation of the ministry of Rockingham. He refused the offer of the Great Seal several times, but, at the earnest request of the King, he accepted the same in January, 1770, and succeeded Lord Camden. By this act he deserted his Whig friends and destroyed his own peace. He died a few days after he became Chancellor, probably by suicide.—*Thomas' Biog. Dict.*

late Chief Justice, your father; I have the honor to be known to him, and if any solicitation of mine could be of the least service, I would go over to try what might be done in it."

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But it was not till twenty years after, when Mr. Ryder had served in the House of Commons during several parliaments for the borough of Tiverton, and had zealously supported the administration of Lord North, that he was at last raised to the peerage by the title of Lord Harrowby.¹

After
twenty
years
Ryder's son
receives
the title of
Lord
Harrowby.

We must now go back to take a parting glance at the old Chief Justice himself, who, if he retained any of his human feelings after shuffling off this mortal coil, must have been rather indignant when observing the neglect with which his heir had long to struggle, although he might not care much about his own dwindling reputation.

I have nothing more to say in his praise as a public man, but it should be known that in private life he displayed the most amiable qualities, and that no fault could be imputed to him, except, perhaps, that he was rather too uxorious. In his thirty-third year he married a charming woman, to whom he was tenderly attached—Anne, daughter of Nathaniel Newnham, Esq., of Streatham, in the county of Surrey, and he lived with her in uninterrupted harmony and happi-

Sir Dudley
Ryder's
amiable
character
in domestic
life.

1. Unfortunately the Ryder family had a quarrel with Lord Mansfield about the state coach, which was to be transferred to the new functionary at a valuation, as the Lord Chancellor's coach is still transferred. A testy note, dated November 20, 1756, says—"Lord Mansfield is only solicitous that Mr. Ryder may do what is most agreeable to himself, and as to the rest is extremely indifferent. But he would not, for much more than the value of the coach, have more than one word about such a transaction with Mr. Ryder, for whom he has the greatest regard, and to whom, upon his father's account, he would be ready to show upon all occasions every act of civility and friendship." I do not know whether the collar of S.S. passed with the coach. This gold decoration is the personal property of the Chief Justice; and his family sometimes retain it as a memorial of their founder, and sometimes hand it over to his successor.

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A.D. 1742.

Letters
from him
to Lady
Ryder.

ness. While she possessed a cultivated mind and elegant accomplishments, she managed not only all his household affairs, but all his pecuniary transactions, so as to leave him entirely free for his professional and official pursuits. They never were separated for more than a day except once. In the summer of the year 1742 she fell into ill-health, and she was ordered by her physicians to Bath. He accompanied her, and nursed her till the approach of Michaelmas Term indispensably required his presence in London, while she remained for some weeks behind to complete her cure. During this interval he wrote her a letter daily, however busy he might be,—sometimes doing so while a trial in which he was counsel was proceeding. These effusions are preserved, and I introduce a few of them for the gratification of the reader who is pleased with genuine touches of sentiment and photographic sketches of domestic scenery.

Having been employed by Henry Fielding to move for an injunction to restrain a bookseller from publishing a pirated edition of JOSEPH ANDREWS, and having been defeated by reason of an error in the jurat of the affidavits,—before being called upon to speak in another cause, he thus addressed Lady Ryder:

Oct. 23,
1742.
View of
Westmin-
ster Hall.“Westminster Hall, Saturday.¹

“My dearest Girl,—I can’t help thinking of you in the midst of the noise of Westminster Hall. I have this moment sat down after endeavoring to rescue Jos. Andrews and Parson Adams out of the hands of pirates, but in vain; for this time we are foiled by a mistake in the attack. However, another broadside next week will do the business.

“I find this place just in the same situation I left it in,—filled with the same reverend and learned judges and counsel, and attended with pretty much the same clients.

“The Chief Baron’s cushion is still empty, and I don’t find at all how it is to be filled.

1. Indorsed “Oct. 23, 1742.”

"I am going from hence to Tooting,¹ and expect Molly and Dudley² to call me in case I can't get away time enough to return to Chancery Lane by three.

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"Adieu, my Best Beloved,

"And dearest Friend,

"D. R."

Three days after, he gives her an account of the extraordinary rage for theatricals then stirred up by Garrick:³

"26th October, 1742. Oct. 26.
The Chan-
cellor at
Drury
Lane.

"Last Saturday the Chancellor was seen at Drury Lane playhouse. The extraordinary character of Garrick in Lear would justify the presence of a bishop, especially to my Lord of Killaloo, who has heard that in Ireland the Chancellor and the Judges open the term with a play, at which, I presume, the Bishops assist."

The following was written by him on a most auspicious

1. Where he had a villa.

2. His children.

3. David Garrick, an English actor, born in Hereford, Feb. 20, 1716, died in London, Jan. 20, 1779. In 1728 or '29 he went to Lisbon to visit an uncle, a considerable wine-merchant, where he amused dinner-parties by repeating verses and popular speeches. At 18 he was one of the three scholars at Dr. Johnson's academy. In March, 1736, he set out with his master for London. Johnson and Garrick entered the metropolis with little money and a single letter of introduction. Garrick began to study law, but poverty interrupted his course. His uncle soon after died, leaving him 1,000*l.*, and he next commenced business as a wine-merchant, in connection with his brother, but the partnership was soon dissolved. He was now constant at the theatres, wrote theatrical criticisms, practised declamation, and in the summer of 1741 made his first appearance as an actor at Ipswich, under the assumed name of Lyddal. He made his first appearance in London at a little playhouse in Goodman's Fields, Oct. 19, 1741, acting Richard III. with great effect. His fame spread rapidly; the great theatres were deserted, and all the fashion came to Goodman's Fields. He next made an engagement at Drury Lane for 500*l.* a year. In 1743 he gained the friendship of Pitt, afterwards Earl of Chatham, and of Lyttleton. Garrick was now the first of English actors; he excelled in comedy, farce, tragedy, and pantomime. In 1749 Garrick married the German dancer Mlle. Violette, who is said to have brought him 6,000*l.* She was accomplished, intelligent, and a faithful wife, and survived him till 1822, when she died suddenly at the age of 98.—*Encyc. Brit.*, vol. x. p. 83.

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cious anniversary—which luckily fell that year on a Sunday, when he was left entirely free from the distractions of business:

“Streatham, 1st Nov. 1742.

Nov. 1.
Anniver-
sary of Sir
Dudley
Ryder's
wedding-
day.

“My Dear,—I am now here to celebrate your wedding-day. Let me congratulate myself and you on the happiest circumstance of my life. How many joyful hours had I lost if my good fortune had not thrown me in your way! I should not, indeed, have known my loss, but I might now have been lamenting another wedding, or sinking under the weight of solitude and indolence, without any end to pursue by all my labors, or satisfaction in my acquisitions. Accept, my dear, the warmest acknowledgments of a grateful heart for the many blessings you bestow upon me; and, above all, for my dearest boy, whose mind daily opens and discovers a fund of goodness and understanding that charm me. I am just come from teaching him the New Testament in Latin. He makes his comments so naturally on every verse, that I am better pleased with the knowledge he treasures up than the Latin he acquires by it. He has found out a method of discovering the end of the world which neither Whiston nor any other of our commentators on the Revelations have hit upon. ‘Papa,’ says he, ‘the Bible says the end of the world will not come till the gospel is preached to all nations: now the Blacks and the Turks have neither of them had it; so we may be sure the world is not yet near its end.’

“I am, my dearest,

“Yours for ever,

“D. R.”

The next letter, remarkable for its lively gossip, was written in an evening sitting of the Court of Chancery, during the hearing of a cause, after Sir Dudley had dined with the Chancellor of the Exchequer, and had (I suspect) partaken very copiously of his claret. These evening sittings were continued till the beginning of the reign of George III., when they were abolished with the consent of that sovereign, on the avowed reason that the Chancellor himself was apt to appear at them not “as sober as a judge” ought to be.¹

1. See *Lives of the Chancellors*, vol. v. ch. cxl.

"Lincoln's Inn Hall, Nov. 3, 1742. CHAP. XXVII.

"My Dear,—I have received your letter, and must answer it now or not at all to-night. I have been to pay my compliments at the Prince's court. Miss Fazackerley appeared there for the first time, and kissed hands. Mrs. Campbell inquired there after your health. She looks like a ghost,—not at all improved by Tonbridge. I to-day dined, by invitation, at the Chancellor of the Exchequer's. It was in the same house where I used to see Lord Orford. How different now from what it was! not more in the nakedness of the walls than the abilities and disposition of its owner. The Earl of Bath has just had a great windfall by the death of one Mrs. Smith. She was mistress to the late Earl of Bradford, who had settled upon her and her son an estate of about 8,000*l.*, a year, and in case of the son's death without issue the disposition of it was given to her. The son became a lunatic, and is now under the care of the Court of Chancery without any probability of recovery. The Earl of Bath had assisted the mother as a friend to the Earl of Bradford. She in recompense has given him, in case of her son's death, the bulk of the estate. She has a husband, who had so nice a sense of honor, that he would not only have nothing to do with her while she was in that criminal correspondence, but since would not meddle with the wages of iniquity, and so left her and every thing to her own conduct.

"I would have you make haste to town and keep me out of bad hands, for I am in great danger of growing a rake whilst left to myself, for I have been no less than twice at the play in a week's time. It's true the immediate temptation was to see Garrick, but how soon I may recover my youthful taste for *dissipation* I can't say. I'm glad the Bishop is coming to town.

"Adieu, my dearest,

"D. R."

The following letter, written next day, ingeniously assigns a very innocent origin to a headache with which Sir Dudley was then afflicted. But we cannot place exactly the same confidence in these effusions as in Pepys's Diary,¹ which was never meant to meet

1. Samuel Pepys was born at Brampton, Huntingdonshire, Feb. 23, 1632, and educated at St. Paul's School, whence he removed to Magdalen College, Cambridge. After leaving the University he became Secre-

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even the eye of a wife, and therefore conceals nothing that she ought not to know. The headache might perhaps have been traced to a second bottle at the Chancellor of the Exchequer's, in which the preceding letter indicates that Mr. Attorney had indulged, although he was afterwards to plead before the Chancellor:

Nov. 4.

"Nov. 4, 1742.

"My Dear,—The Bishop is come very well, after a pleasant journey. I wish I had seen you come in at the same time; but I must wait. I can't easily believe that the excess of joy on our meeting will make amends for the uneasiness I feel by your absence. I'll bear it, however, as well as I can. But you have not yet told me the utmost period of your stay. Let me know it, that I may be able to see to the end of my sorrow, and have the daily pleasure of counting the end of its approach.

How a
lawyer
may ac-
count for
headache
got by
taking
too much
wine.

"You bid me tell you every post how my health stands, which is of more moment to me as you are interested in it. I am obliged, therefore, to let you know that I have had the headache all day. You'll expect, I know, an account how it came. I believe it was owing to my quitting my full-bottom and gown, without an equivalent, at the Chancellor of the Exchequer's. I am sorry to give you the trouble of hearing this; but I am bound to be ingenuous and make a true confession. I fear I shall not be completely careful of myself till you come and give

tary to the Navy, and next to the Admiralty. He was in great favor with Charles II., who communicated to him the narrative of his escape after the battle of Worcester. He was elected president of the Royal Society in 1684, and held that office two years. In 1690 he resigned his place in the Admiralty, and died May 26, 1703. He wrote "*Memoirs of the English Navy*," and made a large collection of manuscripts, particularly old poetry, which he bequeathed to Magdalen College. Among these manuscripts was the celebrated Diary, which has rescued the name of Samuel Pepys from almost total oblivion. This highly amusing record of his personal experiences, thoughts, and foibles, which gives graphic sketches of society and domestic manners in the reign of Charles II., was written in Rich's system of shorthand, and remained unnoticed on the shelves of the Pepysian Library until the commencement of the present century, when it was deciphered by the Rev. John Smith, and published under the editorial supervision of Lord Braybooke, under the title of "*Memoirs of Samuel Pepys, Esq., comprising his Diary from 1659 to 1669.*"—*Cooper's Biog. Dict.*

that cheerfulness to my spirits which makes me think it worth while to be well, as I hardly do while you are absent.

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"Adieu, thou best of women,

"D. R."

The next letter accompanied the coach and four heavy blacks by which she was to be conveyed to London. The vehicle was to be four days in going to Bath, and four days coming back,—and there was yet no quicker transit for a family; post saddle-horses were provided on the principal routes for cavaliers, but those who travelled in their own coaches were, for years after, obliged to perform the whole journey with their own cattle.

"Tuesday,¹

Nov. 30.
Departure
of the
family
coach for
Bath to
bring back
Lady
Ryder.

"My Dear,—The coach goes to-morrow morning. I am impatient till it returns. We have never been separated so long. How do you like it? It is a solitude very different from that which I had before we were united, when I did not know the happiness of such a union.

"I am just come from the House. The great attack was not made to-day. I understand our enemies can't yet agree about it. We, however, expect it soon, but without fear. Their strength is tried to-day, though in a lesser matter. A Tory petition against the sitting Member for Derby was presented to-day. They would have brought it to the bar of the House, which was debated about an hour, and we rejected it by a majority of 235 against 190. We look upon this as a stronger question against us than any they can make on their intended motion.²

"My dear, I have the greatest satisfaction in the thought of seeing you so soon. Think of me, and believe that I am and always shall be, with the greatest tenderness,

"Your affectionate husband,

"D. R.

1. Indorsed "Nov. 30, 1742."

2. It was on election petitions, the merits of which were not at all regarded, that the strength of parties was chiefly tried. A few months before, Sir Robert Walpole had been turned out by an unfavorable division on the petition complaining of an undue election for Chippenham. (Jan. 28, 1742.)

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"P.S. Your thoughts about not dining on the road and making four days of it, fall in with what I wrote to you yesterday."

I close my specimens of this conjugal correspondence with an extract from the last letter he wrote to her during this separation, which would be received by her as she stopped for the night on her approach to London :

Dec. 3.
Sir Dud-
ley's joy at
her ap-
proach.

Friday, Dec. 3.

"My heart leaps for joy at the thought of the time of your return being so near. I can hardly think of anything else, except when business calls me off. We had another attack to-day by a motion for a Place Bill. It seems principally calculated to abuse Sandys and his companions, the newcomers, by forcing them to eat their own words of the last session. However, they can digest them with their places. We carried it in the negative by 221 to 196. This you will say is not a great majority. The truth is, some people are hard put to it to distinguish between this session and the last ; others are afraid of their boroughs ; others think it is a popular thing, and have a mind to seem patriots. So that many who are with us in other things deserted us here."

She sur-
vives Sir
Dudley
many
years.

The amiable lady to whom these letters were addressed was deeply afflicted by the loss of her husband, the Chief Justice ; but the disappointment in never wearing the coronet upon which she had received so many congratulations was no aggravation of her sufferings. Her exemplary piety triumphed over her grief for her bereavement, and she survived her husband many years.

His de-
scendants.

A.D. 1809.

I have already told how their son was at last ennobled. His son Dudley, by a daughter of Terrick, Bishop of London, was a most distinguished statesman and orator,—filled high offices in the reigns of George III. and George IV.,—was created Viscount Sandon and Earl of Harrowby,—and might have been Prime Minister if he had pleased. The Chief Justice is worthily represented by the present Earl,¹ his great-

1. Written in 1848.



CHIEF JUSTICE WILLES.



grandson, who, after having long served in the House of Commons as member for the important commercial constituency of Liverpool, is adding in the other House of Parliament to the splendor of the name he bears—so that old Sir Dudley must now rejoice over the entire fulfilment of his grandfather's prophecy.

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CHAPTER XXVIII.

LIFE OF CHIEF JUSTICE WILLES.

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Two Chief
Justices
of the
Common
Pleas.

BEFORE devoting myself to the most illustrious Chief Justice of the King's Bench, Lord Mansfield, I must beg leave to introduce two Chief Justices of the Common Pleas, each of whom refused the Great Seal of Great Britain, the one being the most ambitious lawyer of the 18th century, and the other the least ambitious of all the lawyers recorded in our juridical annals,—CHIEF JUSTICE WILLES, and CHIEF JUSTICE WILMOT.

I have no respect for the former, and I shall despatch him very rapidly. Although a man of splendid abilities, he was selfish, arrogant, and licentious; and, although at one time there was a strong probability that he would play a very important part in public life (in which case an interest would have been cast upon his early career), he died disappointed and despised. Among the bright legal constellations he twinkles a star of the tenth magnitude, and he does not deserve to be long examined by the telescope of the biographer.

Origin
of the
Willeses.

The Chief Justice himself affected to derive his name from VELLUS or VILLUS, and tried to connect his ancestor with the ARGONAUTS who carried off the GOLDEN FLEECE;—while his detractors preferred the etymology of VILIS or VILICUS, and insisted that if the individual of his race who first bore a surname was not a *villain*, he was not higher than the *bailiff* of the lord of a manor. In sober truth, the Willeses

were a respectable family of small estate, long seated in the county of Warwick. For centuries they had been contented to plough their paternal acres, occasionally sending off a younger son to be an attorney or a country parson; but they suddenly rose into distinction, for while the "Head of the House" (as he loved to call himself) was a Chief Justice, and almost Lord Chancellor, his younger brother sat in the House of Lords as a Bishop.¹

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Of the lawyer, till he entered public life, it will be enough to relate that he was born in 1685; that he was educated at Lichfield Free Grammar School, and Trinity College, Oxford; that he was called to the bar in 1707; that from his youth upward he showed a wonderful combination of steady application to business and striking gravity of manner with extreme profligacy of conduct; and that his determination was to reach the highest honors of his profession at any sacrifice of money, of ease, of principle, and even of pleasure.

Sir John's
early
career.

His success at the bar was respectable, but not such as to enable him to rely on professional reputation. So he resolved to plunge into politics, and on the dissolution of parliament in 1722 he declared himself a candidate for Weymouth, long one of the most venal and most expensive boroughs in England. After a severe contest, which cost him more than all he had been able to save from his fees, he was returned, and joyfully took his seat in the House of Commons.²

As Sir Robert Walpole had gained undisputed power on the death of Lord Sunderland,³ Willes en-

He enters
parliament, and
is made a
Welsh
Judge.

1. The Right Rev. Edward Willes, D.D., successively Bishop of St. David's and of Bath and Wells, consecrated in 1742—died in 1773.

2. In subsequent parliaments he was returned at a small expense for the close borough of West Looe.

3. Charles Spencer, third Earl of Sunderland, son of the second Earl, was born 1674. He was returned member for Tiverton 1695, and continued to represent that borough till he was called to the House of Lords on his father's death 1702. In 1705 he was diplomatically employed at

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listed himself under the banner of the new minister, and hoped to gain favor not only by making himself useful in parliament, but by a rich stock of facetious stories, in which his patron took delight, and which, as the second bottle was going round, he could bring out with redoubled effect from his usual starchiness of demeanor. At first every thing turned up to his mind.

the courts of Berlin, Vienna, and Hanover. In 1760 he was nominated one of the commissioners to treat for a union with Scotland, and at the close of that year he was not only made a Privy Councillor, but the Whig leaders perceiving that the Queen favored the Tories, he was forced by them into the office of Secretary of State. In 1709-10, on account of the conduct of Sunderland with regard to Sacheverell and his supporters, the whole influence of the high-Church party was exercised to procure his dismissal from office, and the Queen commanded him to deliver up the seals, at the same time offering him a pension of 3,000*l.* per annum, which he indignantly refused. On the death of Queen Anne, Sunderland, who was accounted the great leader of the Whigs, expected, in return for the zeal he had displayed on behalf of the house of Hanover, to be placed at the head of the new administration; but although the King treated him with great attention, and several places of dignity were conferred upon him, some years elapsed before he could attain the exalted station to which he aspired. Shortly after George I.'s arrival in England, the Earl was sworn of the Privy Council, and appointed Lord Lieutenant of Ireland. In 1715, ill-health having compelled him to resign his viceregal office, he was constituted Lord Privy Seal; and in 1716 he became Vice Treasurer of Ireland. In September the same year he went to Hanover with the King, over whom his influence now rapidly increased. In April, 1717, he achieved a political victory over Walpole and Townshend; on whose resignation he was appointed, in the first place, Chief Secretary of State, shortly afterwards, First President of the Council; and finally, First Lord of the Treasury. At this period Sunderland brought forward a Peerage Bill, with the object of checking the authority of the Prince of Wales when he should become King, and of extending the duration of his own authority by the elevation of a number of his adherents to the House of Lords. This unpopular measure was passed by the Lords, but rejected by the Commons. In 1718-19 he resigned the Presidency of the Council, but was on the same day appointed Groom of the Stole and First Gentleman of the Bedchamber. The year 1721 was rendered remarkable by the celebrated South Sea Bubble, the bursting of which proved fatal to the political supremacy of Sunderland. He was implicated in the criminal transactions charged upon the directors of the scheme, and although he was acquitted by a vote of 233 to 172 of his peers, he was obliged to give up office. He continued, however, to exercise considerable influence over the King, and during the remainder of his life he was busily engaged in intrigues to effect the downfall of Walpole. Died April 19, 1722.—*Cooper's Biog. Dict.*

Without making any dashing speech, he was serviceable to Government; he assisted in carrying through the House of Commons the proceedings against Bishop Atterbury¹ and the bill for doubly taxing Roman Catholics,—and he added to the popularity of the Government by distantly rivalling Sir Robert himself, after the ladies had withdrawn, in drawing forth loud roars of laughter from the squires who had been invited to dine at Chelsea.² Accordingly, before two sessions had expired, such merits were rewarded with a “Welsh wig;” he was appointed “Second Justice of Chester,” and he thought the Great Seal within his grasp. But, afterwards, his patience was long and cruelly tried, and many bright gleams of hope were succeeded by the alternating gloom of despondency. When he had

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Subse-
quent dis-
appoint-
ments.

1. Francis Atterbury, an English theologian and politician, born March 6, 1662, died in Paris, Feb. 15, 1732. He was the son of a clergyman, and was educated at Westminster School, and at Christchurch College, Oxford, where he took his bachelor's degree in 1681. In 1687 appeared his controversial work, “A Reply to ‘Considerations on the Spirit of Martin Luther and the Original of the Reformation,’” a pamphlet written by Obadiah Walker, a Roman Catholic, Master of University College. Atterbury's defence of Protestantism was long classed among the best of such arguments. He now acted for several years as tutor to young Boyle, afterwards Earl of Orrery. Taking orders in 1691, his eloquence as a preacher procured him several offices in the Church, and finally the appointment of chaplain to the King and Queen. He was constantly involved in controversies on theological and literary subjects. In 1702 he was appointed a chaplain in ordinary to Queen Anne, in 1704 Dean of Carlisle, and in 1707 Canon in Exeter Cathedral. In 1713, on the recommendation of Lord Oxford, he became Bishop of Rochester. Having been convicted of participation in a treasonable plot for the forcible restoration of the Stuarts, he was sentenced to expulsion from his offices and to perpetual exile. In June, 1723, he left England for France, with his daughter Mrs. Morrice, and resided in Paris during the remainder of his life. He was buried in Westminster Abbey, though without public ceremony; and the Government afterwards caused his coffin to be opened in search for treasonable papers supposed to be hidden in it.—*Appl. Encyc.*, vol. ii. p. 93.

2. Ascending the Grosvenor Road we come to Chelsea, which in the last century, from a country village, has become almost a part of London. As regards the etymology of its name, formerly written Chelchyth, the opinion of Norden is generally followed, who says that “Chelsey was so called of the nature of the place, whose strand is like the *chesel*, which the sea casteth up of sand and pebble-stones.”—*Hare's Walks in London*.

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been eleven years in parliament he was still only "Second Justice of Chester." Nevertheless he could not complain of being ill-used, for he did not expect to supersede Sir Philip Yorke, who had long been Attorney General; and although the office of Solicitor General had twice become vacant, he did not deny the superior claims of Sir Clement Wearg and Mr. Talbot. One of these competitors was removed by a premature death,¹ another succeeded Lord Raymond as Chief Justice of the King's Bench, and the third obtained the Great Seal on the resignation of Lord King.

Nov. 30,
1733.
He be-
comes
Attorney
General.

Willes at last got the step which he thought insured him all else that he desired;—and, to crown his present felicity, at the same time that he was constituted Attorney General he was promoted from "Second" to be "Chief Justice of Chester,"—the duties of law officer of the Crown, and of a Judge in this County Palatine and in the principality of Wales, not being considered incompatible.²

Soon after, it was thought that the Administration was in danger from a coalition, brought about by Lord Bolingbroke, between the Tories and the discontented Whigs. Their grand movement was an attack upon the SEPTENNIAL ACT, which the Tories had always strenuously opposed, and which Whigs not in office, nor likely to be, although they formerly supported it, had lately discovered to be highly unconstitutional. In the famous debate on Mr. Bromley's motion for

March 13,
1734.

1. From "A Brief Memoir of Sir Clement Wearg," published in 1843, by his relative, George Duke, Esq., of Gray's Inn, barrister-at-law, he appears to have been a most learned, eloquent, and excellent man. He died of a violent fever, in the prime of life, on the 6th of April, 1726, when he had been three years Solicitor General. He was succeeded by Talbot, afterwards Lord Chancellor.

2. Down almost to the time when these jurisdictions were abolished, Sir William Garrow and Sir John Copley held, at the same time, the offices of Attorney General and Chief Justice of Chester. We have now lost the professional joke of the Prime Minister baiting his *rat-trap* with *Cheshire cheese*.

leave to bring in a bill to repeal it, Mr. Attorney General Willes, afraid of being speedily shorn of his new honors, made an extraordinary exertion, and delivered a speech which was very much applauded. I give a few extracts from it to show how such topics, which still annually come before us, were treated a hundred years ago:

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"Gentlemen have been pleased to put us in mind of our ancient constitution; but it has been so often varied and improved, that they must be puzzled to fix the time when it was in that perfect state which we ought at present to adopt and for ever abide by. Are we asked to go back to the witenagemote, or to prelates and barons,—without any representatives from counties, cities, or boroughs? or to prelates, barons, and representatives of counties, cities, and boroughs,—sitting together in one and the same assembly? Rather than admire the constitution when unformed and weak, I would admire it in its strength and vigor. Therefore I admire it as I find it, and I would rather go on to improve it than mar the improvements which it has received. Let me observe that at the Revolution there was nothing in the *Claim of Rights* or in the *Bill of Rights* about annual or triennial parliaments. When we read of the advantage of 'frequent parliaments,' we are to understand frequent sessions of parliament—not that the parliament is to be changed every session. We all know that the Triennial Bill was neither introduced nor promoted by the patrons of liberty or the real friends to King William's government. The object of the measure was to distress that good prince, and the bill when passed was found to be of dangerous consequence to the prosperity of the nation and to the quiet of the subject. At last the Septennial Act passed, which is the true medium between the unlimited common-law prerogative of the Crown and the other extreme of statutably extinguishing every parliament after it has sat three years, whatever perils may arise in any particular crisis from there being no parliament, or from a general election. If King William had enjoyed the benefit of septennial parliaments, he would have carried on war and he would have negotiated peace with much greater advantage, he would have escaped the treaties for partitioning the Spanish monarchy which have been so much objected to, and he would have been better able to

His speech
against the
repeal of
the Septen-
nial Act.

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His speech
against the
repeal of
the Septen-
nial Act,
continued.

humble the power of France and to secure the happiness of this nation. I have reason therefore to say that the constitution has now reached its highest perfection. The alleged power of corrupting a parliament which sits long, we may know to be imaginary from the fact that King Charles II.'s Long Parliament, which at first was called the *Pensionary Parliament*,¹ and was disposed to make him absolute, at last became so refractory that he accused it of a design to dethrone him, and he abruptly and indignantly dissolved it. Short parliaments lead to corruption. Corruption is not of one sort only; it appears in many shapes. An elector may be bribed without giving him money, and members of this House may be bribed without getting any place or preferment from the Government. If, to please his borough and to secure his next election, a member votes against his judgment, is not this bribery, and bribery the most degrading and pernicious? An honorable gentleman says that septennial parliaments are necessary to support falling ministers. Sir, I can only say that I have been travelling lately in many parts of England, and, wherever I have been, I have found the present ministers held in high estimation; insomuch that, when this parliament has sat out its seven years, I am convinced that another will be returned for seven years more, equally discerning, loyal, independent, and well-disposed as the present."

Mr. Attorney's speech gained him much credit, although the victory was chiefly ascribed to Sir Robert Walpole's,—in which he drew such a character of Bolingbroke that he made the Whigs ashamed of acting under him; and by which, according to Coxe, he drove the disappointed intriguer abroad, in despair of ever recovering any ascendancy in England.²

1. This Parliament—sometimes called "the Long Parliament," until that name became more distinctly appropriated to the assembly of 1640—was summoned to meet at Westminster on the 8th of May, 1661, and was not dissolved until the 24th of January, 1679. It thus existed for nearly eighteen years. It derived its name of "Pensionary" from the fact that many of its members were in the habit of receiving bribes from the King and the ministers; and it has also been discovered that some of them were in the pay of the Court of France.—*Jennings' Anc. Hist. Brit. Parl.* (Am. Ed.) 7.

2. 9 *Parl. Hist.* 394-479; Coxe's *Memoirs of Sir R. Walpole*, p. 426; Lord Mahon's *History*, ii. 264-272.

When Willes had been Attorney General three years, the office of Chief Justice of the Common Pleas CHAP. XXVIII.
Jan. 23, 1737. fell vacant, and he accepted it, — far from suspecting He is made Chief Justice of the Common Pleas. that he was thereby to be for ever “shelved,” but considering that it would prove, as it had before done, a stepping-stone to the woolsack. He had hardly been installed in this intermediary dignity when he thought that his fondest expectations were to be instantly realized, all England being thrown into mourning by the sudden death of Lord Chancellor Talbot.¹ To his unspeakable mortification, although he had continued in the good graces of the Prime Minister, and still played his part in retailing his old stories to the country squires, adding anecdotes of his own adventures, he was never once thought of for advancement on this vacancy. Whether Sir Robert Walpole dreaded that habits and conversation which he could not openly censure—for they were very congenial to his own—might not be quite suitable to the grave magistrate who was to be placed in the “marble chair” and to preside over the general administration of justice, I know not; but he immediately offered the Great Seal to Lord Hardwicke, then Chief Justice of the King’s Bench; and, upon this grasping aspirant trying to make too hard a bargain in demanding pensions and tellerships, he threatened to go to Fazakerley, a professed Tory lawyer and suspected Jacobite, saying, as he took out his watch, “It is now twelve o’clock; if by one you do not agree to my terms,—by two, Fazakerley will be Lord Keeper, and one of the staunchest Whigs in England.” The treaty was instantly concluded; and very probably there was a secret article in it that Willes should not even be promoted, as he might naturally expect to be, to the office of Chief Justice of the King’s Bench; for Lord Hard-

Feb. 14.
His disappointment on the death of Lord Chancellor Talbot.

1. See Lives of the Lord Chancellors.

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wicke was jealous of him, hated him, and wished to be succeeded by some safe man, like Mr. Justice Lee, who never would be formidable as a rival.

A.D. 1742.
His in-
trigues
with Lord
Carteret.

Willes henceforth entirely renounced all intercourse with Sir Robert Walpole, and entered into a political connection with the leaders of Opposition, particularly with Lord Carteret. When the division on the Chippenham election showed that a change of government must inevitably take place, he believed that the Chancellor would go out with the Prime Minister, and that his own elevation was at hand. But, to the surprise of mankind, Pulteney refused to take office himself, and consented to the Duke of Newcastle and Lord Hardwicke—whom he had often abused so bitterly—still holding their places.

Their
failure.

The only game left to Willes was to try to create jealousies between the new section of the Cabinet and the old. With this view he strove to stir up Carteret to claim the premiership, and to engross all the patronage of the Government. But this most accomplished though most flighty statesman, intent on diplomatic negotiations and royal smiles, had no steady ambition, and neglected all those smaller cares by which alone party influence can be acquired or retained. On one occasion, Willes calling upon him to apply for an appointment, "What is it to me," he cried, "who is a judge, and who is a bishop? It is my business to make kings and emperors, and to maintain the balance of Europe." "Then," answered the Chief Justice, "those who want to be judges or bishops will apply to those who will condescend to make it their business to dispose of judgeships and bishoprics."¹

A.D. 1746.

Willes, in fulfilment of his own prophecy, for some time cultivated the Pelhams, but found that they were

1. Horace Walp. Mem. of Geo. II. i., 147.



25. HROGOTT HROGOTT



unalterably attached to Lord Hardwicke;—and then he professed himself an adherent of Pitt. In this weary round he often sank into low spirits, and the sensual gratifications which had soothed his political disappointments began sadly to pall upon him.

At last, the dreams of power, in which alone his imagination now luxuriated, seemed actually fulfilled. In truth, the grand object of his ambition was placed within his reach, and he lost it by his own gross mismanagement, so that he was left without the consolation of complaining of his evil fortune.

When the Duke of Newcastle and Lord Hardwicke were driven to resign, the ministers who, for a short time, inadhesively formed the new cabinet under the nominal leadership of the Duke of Devonshire were favorably inclined to Sir John Willes, and adopted him as their principal legal associate, relying upon him to counteract the machinations of the VOLPONE, who, he said, had unjustly kept him out of the office of Chancellor for twenty years.¹ But, on account of the prejudices of the King, who had falsely been told that the Chief Justice of the Common Pleas had in him as little *law as morality*, there was a serious difficulty in at once conferring upon him the dignity to which he aspired. An arrangement was made that the Great Seal should be a short time in commission, that he should be First Commissioner, and that it should, ere-long, be transferred to his sole custody, with the title of Lord Chancellor, or Lord Keeper, and a peerage. Accordingly, on the 19th day of November, 1756, he took his seat in the Court of Chancery, and saw the

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A.D. 1756.
He is made
First Lord
Commissioner of
the Great
Seal.

November.

Nov. 19.

1. "Lord Chief Justice Willes was designed for Chancellor. He had been raised by Sir Robert Walpole, though always browbeaten by haughty Yorke, and hated by the Pelhams, for that very attachment to their own patron. As Willes's nature was more open, he returned their aversion with little reserve. He was not wont to disguise any of his passions,"—*Walp. Mem. Geo. II. i.*, 76.

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mace and the embroidered purse containing the Great Seal lying before him; but he was galled by the thought that he enjoyed only divided empire, for Sir Sidney Stafford Smythe was on his right hand, and Sir John Eardly Wilmot on his left, with coördinate authority.

His ability
in that
capacity.

Lord Chief Commissioner Willes did the business of the court with much ability, and a general expectation was entertained that he was to turn out an eminent equity judge. He likewise reformed the scandals of his domestic establishment, and every obstacle to his elevation seemed removed.

He loses
the Chan-
cellorship
by his own
mis-
manage-
ment.

The horizon was for a time overcast, on the dismissal of Mr. Pitt and the dissolution of the Duke of Devonshire's short and ill-concocted government; but a brighter sunshine irradiated the steps of Sir John Willes when the famous coalition was completed between Mr. Pitt and the Duke of Newcastle. These chiefs, without feeling any attachment to him, were both contented, for the sake of convenience, that he should be admitted into the cabinet, and should be created Lord Chancellor. To please the King, they first offered the Great Seal to Lord Mansfield, knowing full well that he would decline it; and likewise to Sir John Eardly Wilmot, from whom they were sure to receive a similar answer, though for very different reasons. The tender was then to be made in due form, and with the King's express authority, to Sir John Willes; but his Majesty was, as yet, in very ill humor, on account of his closet being stormed by the "Great Commoner," and he positively declared that no new peerage should then be created. The First Lord Commissioner was much nettled by hearing that the Great Seal had been hawked about when he had considered that it was his own exclusive property. Further, knowing how it had been declined by

all who were regarded as capable of holding it, he gave himself very haughty airs, thinking that the game was irrevocably in his own hand. Therefore, under the disguise of disliking the proffered elevation, he talked of the comfort and security of the "cushion of the Common Pleas," dwelt upon the sacrifice which he was called upon to make, and positively refused to accept the Great Seal unless he had the promise of a peerage, which had been given to every Lord Chancellor and Lord Keeper since Sir Orlando Bridgman in the reign of Charles II.¹ The conference was broken up; but Willes, though very indignant, was perfectly confident that his terms must be acceded to, and he remained at home in the belief that he should speedily receive a summons to be sworn as Chancellor, with a request to know what title as a baron would be agreeable to him.²

Mr. Pitt, who had secured to himself unlimited power to carry on the war according to his own views, and anticipated his coming glory, was unwilling to run the risk of quarrelling with the King upon such a paltry point as a legal peerage; and, instead of making any further effort to gratify Sir John Willes, he offered the Great Seal to Sir Robert Henley,³ who,

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Sir Robert
Henley be-
comes
Lord
Keeper.

1. He chose to forget Sir Nathan Wright in the reigns of William III. and Queen Anne.

2. A story was circulated, but I believe without any authority, that he had fixed upon the title of LORD COLCHOS; that he meant to have the ARGO galley for his crest, a "fleece or" to be added to his arms, and two argonauts for his supporters. Horace Walpole merely says, in his usual epigrammatic style,—“Willes proposed to be bribed by a peerage to be at the head of his profession; but could not obtain it.” (Mem. Geo. II., ii. 226.)

3. Robert Henley, First Earl of Northington (1708–1772), Lord Chancellor, was the second son of Anthony Henley. He was educated at Oxford and called to the bar in 1732, and began to practise in the Western Circuit, of which he afterwards became the leader. In his youth he was a hard drinker, and when suffering in later life from a severe fit of gout, was overheard in the House of Lords muttering to himself, “If I had known that these legs were one day to carry a chancellor, I’d have taken

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belonging to the Leicester House party, had hitherto been reckoned an enemy, but who was not likely to stand out for conditions, reasonable or unreasonable, and who, from his very moderate abilities, could never be formidable. Henley, who had not expected such an offer from the new ministry any more than to be made Archbishop of Canterbury, joyfully jumped at it, without saying a word about peerage, pension, or tellership; and the arrangement was completed the very same morning that it was first proposed. The Lord Keeper elect then thought that he could not do less than announce his appointment to the First Lord Commissioner, who had the custody of the Great Seal, and courteously arrange with him as to the convenient time when the bauble might be transferred to him. Willes was at his villa, walking about in the garden, still chafed by the affront which he considered he had received, but still not doubting that the proper *amende* would be made to him. He knew that Henley could not well be the messenger for that purpose, but he had not the most distant conception that his visitor had a personal interest in the controversy; and, without leaving any opening for the intended communication, he burst out into a statement of his grievances, thus concluding: "Would any man of spirit have taken the seals under such circumstances? would you, Mr. Attorney?" Henley, thus appealed to, gravely answered, "Why, my Lord, I am afraid it is rather too late to enter into such a discussion, as I have now the honor of waiting upon your Lordship to inform your Lordship that I have actually accepted them."

Scene
between
Sir John
Willes and
Sir Robert
Henley.

better care of them when I was a lad." In 1747 he was returned to Parliament for Bath, and became an active debater. In 1756 he obtained the place of Attorney General. After the accession of George III., he received in 1761 the title of Lord Chancellor, and was created Earl of Northington. In 1766, after overturning the Rockingham ministry, with which as a Tory he could not agree, he resigned his office, and accepted that of President of the Council.—*Stephen's Dict. Nat. Biog.*

Poor Willes never held up his head again;—and he received another blow, which utterly crushed him, when Lord Keeper Henley, preparatory to the trial of Lord Ferrers for murder, was, without solicitation, created a peer, that he might preside on the occasion as Lord Steward.

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Sir John
Willes
broken-
hearted.

The death of George II., the prelude to so many changes, brought no consolation to the heart-broken Chief Justice; for Henley, from his long connection with Leicester House,¹ was a personal favorite with the new sovereign, and was not only allowed by him to get tipsy after dinner instead of holding evening sittings, but was raised to be Lord Chancellor from being only Lord Keeper, and was created Earl of Northampton.² Friends in vain attempted to soothe the wretched Chief Justice, by reminding him of the vanity of worldly greatness, by pointing out to him that he ought to be satisfied with the measure of prosperity he had enjoyed, and by advising him, in estimating his success in life, to think rather of the many competitors whom he had surpassed than of the few

March 27,
1760.

1. Leicester House, which appears in Faithorne's map of 1658 as the only house in the neighborhood, was built for Robert Sidney, Earl of Leicester, from whom it was rented by Elizabeth, Queen of Bohemia,—“the Queen of Hearts,”—who died there Feb. 13, 1662. To this house, in 1668, Pepys went to visit Colbert, the French ambassador; and here Prince Eugene was residing in 1711. The house continued to be the property of the Sidneys till the end of the last century, when it was sold to the Tulk family for 90,000*l.*, which sum the Sidneys employed in freeing Penshurst from its encumbrances. Meantime the Sidneys had not lived here, and Leicester House had become habitually “the pouting-place of princes.” George II. resided there as Prince of Wales from 1717 to 1720, after he had been turned out of St. James's by his father, for too freely exhibiting his indignation at the cruel treatment of his mother, Sophia Dorothea, condemned to a lifelong imprisonment in the castle of Zell. William, Duke of Cumberland, the hero of Culloden, was born there in 1721. Frederick, Prince of Wales, when he, in his turn, quarrelled with his father in 1737, came to reside in Leicester Square with his wife and children. It was there that he died (March 20, 1751).—*Hare's Walks in London*, vol. ii. p. 125.

2. *Lives of the Chancellors*, vol. v. ch. cxl.

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who had been enabled to surpass him. But he answered in the words of Sir Christopher Hatton to Queen Elizabeth, "All will not do: no pulleys will draw up a heart cast down." For several terms before his death he was unable to go into court. He languished till the 15th of December, 1761, when he expired at his house in Bloomsbury Square, in the 76th year of his age. He was buried with his ancestors in the family vault at Bishop's Ickington, in Warwickshire.

His death,
Dec. 15,
1761.

His
judicial
decisions.

I am afraid I may be blamed for neglecting his judicial decisions, but I cannot discover any important points which he ruled, although he presided for so long a period in one of the superior courts in Westminster Hall. There is said to have been very little business in the Court of Common Pleas in his time; a circumstance thus accounted for by Horace Walpole:

How
Horace
Walpole
accounts
for the
little busi-
ness in the
Common
Pleas in
his time.

"He had great quickness of wit, and a merit that would atone for many foibles—his severity to, and discouragement of, that pest of society, attorneys. Hence his court was deserted by them, and all the business they could transport carried into Chancery, where Yorke's filial piety would not refuse an asylum to his father's profession."¹

His high
qualifica-
tions as
lawyer,
justice, and
magistrate.

I believe that, notwithstanding his immoralities, he was a sound lawyer, that his administration of justice was pure and impartial, and that his fame as a magistrate would have been splendid in proportion to the opportunities enjoyed by him of showing his powers and acquirements. He either had extraordinary authority with his *puisnies*, or extraordinary discretion in yielding to the best opinion propounded by any of

1. Mem. Geo. II., i. 76. This is a spiteful allusion to Lord Hardwicke having been the son of an attorney. But the suggestion that the business which ought to have come into the Common Pleas was done in the Court of Chancery, shows that the memoir-writer is entitled to very little weight on such a subject.

them and in persuading the others to acquiesce in it. CHAP. XXVIII. A.D. 1757.
 A case occurring in which the Court was divided, he said, "I think myself unfortunate whenever I differ in opinion with any of my brethren: however, I have the pleasure to reflect that, in the twenty years I have sat here, this is but the third time that there has been any difference of opinion between any of us." They appear to have been unanimous ever after.¹

Chief Justice Willes sat along with the other Judges on the trial of the rebels at St. Margaret's Hill, Southwark;² but he was not called upon to take any leading part,—Lee, Chief Justice of the King's Bench, being present; and he had nothing to do with any other state prosecutions.

The most interesting case which ever came before him was that of Elizabeth Canning, which divided and agitated the country almost as much as the Catholic Question or the Reform Bill in more recent times. He very sensibly agreed with the jury, who convicted her of perjury; he refused her a new trial, and he proposed that she should be transported beyond the seas for seven years. His conduct on the trial of Elizabeth Canning. Generally, the Lord Mayor and aldermen, who are in the commission at the Old Bailey, implicitly submit to the opinion of the judges, as well in awarding punishment as in disposing of questions of law; but, on this occasion, Alderman Sir

1. The case referred to is *Buxton v. Mingay*, 3 Wilson, 70, well known and very distasteful to medical men; the question being, "whether a surgeon is an *inferior tradesman* within the meaning of 4 & 5 W. & M. c. 23, s. 10?" The Chief Justice took the liberal side, saying—"I am clearly of opinion the legislature could never intend that a surgeon is 'an inferior tradesman,' or 'a dissolute person;' although he may sport without being qualified to kill game." But said Bathurst, J.,—"I can never be of opinion that the legislature intended to permit every master of any little mechanic trade to neglect his trade and go a-hunting. I am of opinion that every tradesman is *inferior* who is not *qualified*, and that is the only line we can draw between inferior and superior." Clive, J., concurred with him.—I know not in what category they would have placed "an *unqualified judge*;" but I should call him "an inferior tradesman."

2. 18 St. Tr. 329

CHAP. XXVIII. John Barnard moved an amendment, "that the punishment should be only six months' imprisonment," when a *poll* was taken, and the sentence proposed by the Chief Justice was carried by a majority of eleven (including six judges) against eight (who were all aldermen). Willes appears to have conducted himself on this occasion with firmness, good temper, and dignity.¹

His neglect
of litera-
ture and
men of
letters.

His private
life.

He did nothing to wipe off the reproach cast upon the English bar for a contempt of literature; for he not only never wrote a page for the press in prose or rhyme, but he did not at all mix with men of letters, and his talk was either about law or lewdness. I am sorry to say that the accounts handed down to us of his private life are lamentably unfavorable as far as morality is concerned. Even according to the low standard which then prevailed, he was grossly peccant; and, however little censorious the age might be, his conduct seems to have been severely condemned. Although a married man, with a grown-up family, there were violations of decorum under his own roof which transpired and gave very general offence. Every memoir-writer who notices him gives the following anecdote, which, therefore, I may not omit. A dissenting clergyman, shocked by the rumors which he heard of Lord Chief Justice Willes's domestic establishment, called to remonstrate with him, and, if possible, to stir him up to repentance. After some allusions, which, though intelligible enough, the Chief Justice pretended not to understand, this dialogue

1. 19 St. Tr. 262-694. This is one of the most extraordinary cases of popular delusion on record. Although the romantic story which Elizabeth Canning had told of being stolen by a gypsy woman, whom she tried to hang for the purpose of concealing her own elopement with a lover, was disproved by the clearest and most irrefragable evidence, and by the wholly contradictory accounts which the girl herself had given of it, more than half the nation stood up for, and believed in, her innocence; and innumerable pamphlets were published for her, as well as against her.

CHAP. XXVIII. ensued: *Minister*: "To come to the point, then, my Lord, they say that one of your maid-servants is now with child." *Chief Justice*: "What is that to me?" *Minister*: "But, my Lord, they say that she is with child by your Lordship!" *Chief Justice*: "What is that to you?"¹

His descendants.

John, his eldest son, sat in several parliaments for Aylesbury and Banbury, but gained no distinction; and Edward, his second son, who was bred to the bar, although for some time Solicitor General and a Puisne Judge of the King's Bench, was of slender intellect, insomuch that once, when pleading a cause, and being checked for wandering from the subject, he exclaimed, "I wish you would remember that I am the son of a Chief Justice;" upon which old Mr. Justice Gould² answered, with much simplicity, "Oh, we remember your father, but *he was a sensible man.*"

Chief Justice Willes's heirs in the male line have long been extinct, but many distinguished persons still flourishing are descended from him through females. If by good luck he had actually reached the woolsack, this descent would have been considered a great honor; but it is difficult to say why there should have been such a difference merely from his having pronounced a certain number of equitable decrees,

1. Horace Walpole, who relates the story, says that, in addition to "an unbounded passion for women," he was "notorious for *gaming*;" but I do not find this imputation cast upon him by any other writer, and it is wholly inconsistent with his regular application to business. See *Mem. Geo. II.*, i. 76.

2. Sir Henry Gould (1710-1794), judge. He was admitted a member of the Middle Temple in May, 1728, called to the bar in June, 1734, and elected a bencher in 1754, in which year he also became King's counsel. He had the reputation of being a sound but not an eloquent lawyer. In Michaelmas Term, 1761, he was appointed a Baron of the Exchequer, and on Jan. 24, 1763, was transferred to the Common Pleas in succession to Mr. Justice Noel, then recently dead. He proved to be a good judge. During the riots of 1780 he refused the military protection for his house, which was offered to all the judges.—*Stephen's Dict. Nat. Biog.*

CHAP.
XXVII. good or bad, and having been commemorated in several volumes bound in calf-skin and entitled "REPORTS TEMPORE LORD CHANCELLOR WILLES." Had he suspended his claim to a peerage, all this glory, by which the eyes of lawyers are dazzled, would have been showered down upon him.

CHAPTER XXIX.

LIFE OF CHIEF JUSTICE WILMOT.

WILMOT, a succeeding Chief Justice of the Common Pleas, enjoyed the remarkable distinction of being a lawyer without ambition, and more than once refused the Great Seal,—not from any haggling about the terms on which he should accept it, nor from any dread of its precarious tenure, or calculation that he might enjoy more power and wealth by remaining in the position which he occupied, but from a genuine contempt of power and of wealth as well as of titles, and an ardent love of leisure, repose, and obscurity. Although he certainly was altogether free from the last infirmity of noble minds, and of the sin by which the angels fell, we may lament that he never displayed those high aspirations and heroic efforts to be of service to others which make ambition virtue.

CHAP.
XXIX.
Singular
character-
istic of
Lord Chief
Justice
Wilmot.

John Eardly Wilmot was the second son of Robert Wilmot, a gentleman of respectable family and moderate fortune in the county of Derby. His mother was daughter and co-heiress of Sir Samuel Murrow, a Warwickshire baronet. He was born on the 16th of August, 1709. Having received the first rudiments of his education at a school in Derby, he was sent to the free school at Lichfield, under the tuition of Mr. Hunter, who is celebrated for having flogged seven boys who afterwards sat as judges in the superior courts at Westminster at the same time.¹ Samuel

His birth
and educa-
tion.

1. Among these, besides Wilmot, were Lord Chancellor Northington, Sir Thomas Clarke, Master of the Rolls, Chief Justice Willes, and Chief Baron Parker. Lord Mansfield is generally included in the list; but he never saw the city of Lichfield till he had been called to the bar.

CHAP.
XXIX.
Johnson
and Gar-
rick his
school-
fellows.

Johnson,¹ who had likewise been subjected to his flagellation, gave this account of him: "The head master was very severe, and wrong-headedly severe. He used to beat us unmercifully; and he would beat a boy equally for not knowing a thing or for neglecting to know it. He would call up a boy and ask him Latin for a *candlestick*, which the boy could not expect to be asked. While Hunter was flogging his boys unmercifully, he used to say, '*And this I do to save you from the galloves.*'"² However, under such harsh discipline young Wilmot, like young Johnson, became an excellent Latin scholar, and was imbued with a love of learning. It is remarkable that, although they

1. Samuel Johnson, a learned English critic, lexicographer, and miscellaneous writer, was born in Lichfield, 1709, died in London, 1784. Strange stories are told of Samuel's precocity. It is said that before he was three years old he insisted upon going to church to hear Sacheverell preach. He suffered from scrofula, which disfigured his face and injured or destroyed the sight of one eye. He studied Latin at Lichfield School, and after two years was under the head master, Hunter, who was a brutal but efficient teacher. Johnson afterwards valued the birch as a less demoralizing incentive than emulation. On Oct. 31, 1728, Johnson was entered at Oxford as a commoner, but being too poor to remain at the University, in 1731 he quitted it without a degree. In 1735 he married Mrs. Porter, a widow who was possessed of 800*l.* About this time he began his tragedy of "Irene." In 1749 appeared his "Vanity of Human Wishes," an imitation of Juvenal's tenth Satire. Two years previously, he had printed proposals for an edition of Shakspeare, and the plan of his English dictionary, addressed to Lord Chesterfield. The price agreed upon between himself and the booksellers for the last work was 1,575*l.* In 1750 he commenced his "Rambler," a periodical paper, which was continued till 1752. In this work only five papers were the production of other writers. In 1758 he began the "Idler," which was published in a weekly newspaper. On the death of his mother, in 1759, he wrote the romance of "Rasselas," to defray the expenses of her funeral and to pay her debts. In 1763, Boswell, his future biographer, was introduced to him, a circumstance to which we owe the most minute account of a man's life and character that has ever been written. At his death, his remains were interred in Westminster Abbey, and a statue, with an appropriate inscription, has been erected to his memory in St. Paul's Cathedral.—*Beeton's Biog. Dict.*

2. Boswell, i. 21, 22. Johnson had so high an opinion of the good effects of such severity, that when he heard of a schoolmaster having abolished flogging, he exclaimed, "I am afraid that what his boys gain at one end they will lose at the other."

were several years class-fellows at Lichfield, there never seems to have been the slightest intercourse between them in after-life; but the Chief Justice used frequently to mention the Lexicographer as "a long, lank, lounging boy, whom he distinctly remembered to have been punished by Hunter for idleness."

CHAP.
XXIX.

His description of
Johnson.

When David Garrick,¹ who was at the same time a very little boy in the lowest form, made his first appearance in Goodman's Fields, in October, 1741, Wilmot went to applaud him, and, having often afterwards gone to admire him in his various parts, was present at his last performance at Drury Lane in June, 1776, when he took a final leave of the stage; but there was no private intimacy between them, notwithstanding David's passion for legal dignitaries, which made him pride himself so much upon his friendship with Lord Camden and Lord Mansfield.² This was

His attendance at
Garrick's
last performance.

1. David Garrick was the grandson of a French merchant, who settled in England on the Revocation of the Edict of Nantes. The father of David was a captain in the army, who being on a recruiting party at Hereford, this son was born there, and baptized Feb. 28, 1716. He received his education at the grammar-school of Lichfield, and afterwards was placed under Samuel Johnson, with whom he came to London in 1736. Here Garrick embarked in the wine trade as partner with his brother Peter; but business not suiting his inclination, he turned his thoughts to the stage; and in 1741 made his first appearance under the assumed name of Lyddall, at Ipswich, in the character of Aboan in "Oroonoko." On the 19th of October the same year he came out in "Richard III.," at the theatre in Goodman's Fields; and here his popularity exceeded all that had ever been known in dramatic history. The other houses were deserted, which so provoked the patentees that they exerted their interest in getting the rival theatre suppressed. Garrick now entered into a contract with Fleetwood, of Drury Lane; and in the ensuing summer he was invited to Dublin, where the concourse of spectators was so great every night as to occasion a disorder, which went by the name of Garrick's fever. In 1747 he became a joint patentee of the theatre; and in 1749 married Mademoiselle Violette, a foreign performer. In 1769 he projected an entertainment in honor of Shakespeare at Stratford-upon-Avon, called the Jubilee, which was admired by some, and ridiculed by more as a silly piece of pageantry. On the death of Lacy, in 1773, he became sole patentee of the theatre, which he sold, in 1776, for 35,000*l.*, to Sheridan, Linley, and Ford. He died Jan. 20, 1779, and was buried in Westminster Abbey.—*Cooper's Biog. Dict.*

2. Boswell, iii. 336.

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XXIX.

probably Wilmot's fault, for he was not only afraid of being distinguished himself, but he wished to avoid those who had gained distinction.

A.D. 1724.

After he had been some years under Hunter at Lichfield, the better to prepare him for the University, he was removed to Westminster School; and here he applied diligently to his books, without ever mixing in the amusements of his schoolfellows.

His studies
at Trinity
Hall.

He spent the next four years as a recluse student at Trinity Hall, Cambridge. His ruling passion was to enter the Church, in the hope of obtaining a small living, and spending his days in a remote part of the kingdom, conversing only with the peasants who might be under his pastoral care. His father, however, who appreciated his vigorous talents and his solid acquirements, would by no means agree to this scheme, and insisted on his entering the profession of the law. The dutiful son submitted, though reluctantly, and, before he left Trinity Hall, was initiated in the Roman Civil Law—a study for which this place of education has been always renowned, and to which he afterwards ascribed his proficiency in the Common Law of England.

June, 1732.
He is
called to
the bar.

In the meanwhile he kept terms in the Inner Temple, and after three years' residence there he was called to the bar. We are left entirely in ignorance of the plan of study which he pursued, except that it was solitary; but we know that, without going into an attorney's office, or attending much in court, or appearing at the "Readings," which were still kept up, he rendered himself a consummate jurist. Instead of being vain of his acquirements, he was earnestly desirous of concealing them; as if afraid that the attorneys, hearing of his familiarity with black-letter learning, should send him retainers.¹ He was exceed-

His dread
of being
known or
employed.

1. There was a valued friend of mine, now no more, who went the

ingly successful in gaining his wishes, and for many years he was allowed to remain unmolested. But going the Midland Circuit, in spite of all his efforts he had a little business from family connections in his own county: avoiding display as much as possible, he was on several occasions compelled to show what there was in him,—and by and by, at the Derby Assizes, he was in every cause. Still he contrived to preserve his obscurity in London, till, arguing some demurrers and new trials in causes from his circuit, he was at last betrayed to Westminster Hall as a deep lawyer and powerful advocate.

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XXIX.

He is
betrayed to
Westmin-
ster Hall as
a deep
lawyer and
powerful
advocate.

Sir Dudley Ryder, the Attorney General, thereupon appointed him "Treasury Devil;" and, deriving important aid from his services, and being very desirous to bring him forward, mentioned him to the Lord Chancellor as a man who might be an ornament to the profession, and would one day show himself qualified for the highest judicial station. In consequence he was offered a silk gown. Secretly resolved to refuse it, he wished to have some countenance in the opinion of a friend whom he pretended to consult,—and to whom, after very clearly disclosing his inclination, he said: "Consider it well, and tell me what you think of it, for when I have once hoisted the sail I cannot take it down again; therefore it requires a proper consideration and digestion in every respect. The withdrawing from the eyes of mankind has always

A. D. 1742.
He be-
comes
"Devil"
to the
Attorney
General.

He refuses
a silk
gown, the
appoint-
ment of
King's
Sergeant,
and a seat
in parlia-
ment.

Oxford Circuit for years, *pour passer le temps*, but who had a horror, which was well known, of being professionally employed. At last he affronted an attorney by making him, rather unceremoniously, surrender a place in court when a very interesting trial was coming on, saying that "barristers only were entitled to sit there." The retreating attorney was heard to mutter, "I will have my revenge of him." So, the same night, he sent a brief in an important cause to his antagonist; who returned it with a message that he had been sent for on urgent business to London. The frightened barrister left the assize town early next morning, and never again appeared upon the circuit.

CHAP. XXIX. been my favorite wish; it was the first and will be the last of my life." His friend advised him "to *hoist the sail, sure of a trade wind*;" but, against all remonstrances, he said he would not go within the bar to contend with the King's Bench leaders. It was then proposed to him that, if he would take the coif, he should immediately have the rank of King's Sergeant; the encouraging remark being added, that "in the drowsy confines of the Common Pleas he might remain without any unpleasant collision or notoriety." But he declared his immutable determination "to live and die in a stuff gown."¹

A. D. 1752. He is counsel for the defendant in a *crim. con.* cause. He was once, sorely against his will, obliged to lead for the defendant in an action for *crim. con.* falsely brought against an old schoolfellow, who insisted on having him for his counsel. As the trial proceeded, he got over his nervousness, and delivered an excellent address, which carried the verdict. The parties living near Lichfield, David Garrick took a lively interest in the result, and attended in court, planting himself in a snug corner where he expected to remain unobserved. The following is the account he delivered of the performance of his old schoolfellow:

Garrick's account of his performance. "There appeared much contradiction and confusion in the evidence given by the witnesses, till at length rose Mr. Wilmot, who immediately explained the whole in so clear and animated a manner as to charm as well as inform every one who heard him. I was delighted with the wit and sprightliness with which he unravelled the affair,—pluming myself upon being quite private and unnoticed in so great a crowd, and little thinking that I should be soon brought upon the stage myself. But the counsel, having developed the plot which had been laid against his client, observed, 'In short, gentlemen of the jury, it is nothing more than the story of *The Intriguing Chambermaid* and *The*

1. Some accounts say that he called this his *DOMINO*, and that, like Rabelais, he repeated the text "*Beati sunt qui moriuntur in Domino.*"

*Zying Valet.*¹ And, immediately casting his sparkling eye upon me in my retired corner, in a moment he drew the notice of the whole Court upon me, and I thought I should have sunk into the earth."

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Horace Walpole relates, that, appearing at the bar of the House of Commons as counsel in the Warcham election, he was reprimanded by Pitt, who said that "he brought with him the pertness of his profession;" and that, being prevented by the Speaker from replying in his own vindication, he threw down his brief, and declared that "he never would plead there again."² But I doubt whether Wilmot ever was in this line of practice, and I am convinced that he was not the man to wish to gain *éclat* by such a conflict.

We certainly know that he had the opportunity of revenge if he felt injured, but that he declined it. An offer was made to him of a seat in the House of Commons free of expense. Such a lucky chance—although lawyers, when Queen Mab gallops over their fingers, dream of it still more than of fees—he despised. He equally disliked the notion of making a speech either as a patriot or as a courtier: he might have remained silent in the House, but he foresaw that his health would be proposed as one of the members for the county, and that wherever he appeared he would be asked for a frank. The notion suggested to him that parliament might speedily make him a law officer of the Crown, filled him with consternation.

For ever to avoid all such perils and solicitations, he now took the decisive step of abandoning Westminster Hall altogether, and settling in his native county as a provincial counsel,—which, as he had been disappointed in his wish of being a country curate or vicar, offered him the prospect of almost equal seclusion.

A.D. 1754.
He retires
into the
country as
a provincial
counsel.

1. These two farces, written by Garrick, were then acting with great applause.

2. Mem. Geo. II., ii. 107.

CHAP. XXIX. His father had left him a small patrimony, producing some hundreds a year; and he had married Sarah, the daughter of Thomas Rivett, Esq., of Derby, afterwards representative of that borough in parliament, with whom he had received a small portion yielding a few hundreds more.¹ Accordingly, he sold his chambers, took a house in Derby, and settled there with his family, nevermore expecting to see persons of more worship than the mayor of the town, or churchwardens who might come to consult him respecting the settlement of a pauper.

He is appointed a Puisne Judge of the King's Bench.

Near a twelvemonth passed over him and found him contented and happy in this retreat,—when, one fine spring morning, he received official information that his Majesty had been pleased to appoint him a Justice to hold Pleas before his Majesty himself—or, in other words, a Puisne Judge of the Court of King's Bench. This had been preceded by a rumor, which had reached Derby, that such an appointment was in contemplation; but this rumor he had wholly disregarded, as he not only never had solicited the appointment, but he had never been consulted about it, and it had never entered his imagination.

How his consent was gained.

At first he declared that nothing should induce him again to revisit the smoke and noise of London,—but being told that, independently of all consideration of his increasing family, it was his duty to submit himself to the King's pleasure and to serve the public according to the best of his ability, he consented to allow the proposed honor to be thrust upon him. This was the doing of Sir Dudley Ryder, now Chief Justice of the King's Bench, who, on the vacancy occasioned by the

1. This marriage took place in April, 1743, when the venerable Hough, Bishop of Worcester, then ninety-two years of age, writing to an aunt of the future Chief Justice, says,—“I am much pleased that Mr. Eardly Wilmot has chosen a wife whose character you approve: 'tis an argument of his good sense that he looks not after money in the first place; for, if God gives him life and health, he cannot fail of making his fortune.”

death of Sir Martin Wright, was anxious to have by his side his old DEVIL, in whom he so much confided. Accordingly, in Hilary Term, 1755, Wilmot, having been called Sergeant, and knighted, took his seat as one of the Judges of the Court of King's Bench.

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A.D. 1755.

The appointment, although grumbled at by some pert practitioners who thought they were slighted by being passed over, was soon justified by the admirable manner in which the new Judge performed his duties. As unostentatious as ever, he still strove to shrink from observation; but, at times, he, in spite of himself (as it were), delivered pithy and luminous judgments,—and often it was observed that, by a hint, a whisper, or a look, he guided his brother Judges—insomuch that, like one of his predecessors, he was compared to the helm which, itself unseen, silently keeps the vessel in her right course.

His admirable performance of his duties.

Not insensible to the respect which he created and the service he rendered, he was nearly reconciled to his new mode of life, when he was thrown into deep distress by the sudden death of his friend Lord Chief Justice Ryder while a patent was passing for ennobling him.

May 25,
1756.

A judicial crisis followed, which lasted some months; Mr. Murray, the Attorney General, claiming the office of Chief Justice, and the Duke of Newcastle trying, by solicitations and bribes, to keep him in the House of Commons. During this interregnum Sir Eardly Wilmot wished earnestly that he were again a provincial counsel in his small house at Derby, laying down the law to parish officers: for he was obliged often to take the lead in the Court of King's Bench, and, gaining great credit, notwithstanding his desire to be quiet, a rumor was spread, which reached him, that if Murray could be prevailed upon to forego his claim he himself was to be promoted to be Chief Jus-

He is obliged often to take the lead in the King's Bench.

CHAP. XXIX. tice. The two senior Puisnies were Sir Thomas Denison and Sir Michael Foster, and they, though respectable men, were nearly disabled by age and infirmity.

Nov. 11. To Wilmot's unspeakable relief, Murray prevailed, and, under the title of Lord Mansfield, took his place as Chief Justice of the Court of King's Bench. These two profound lawyers and accomplished scholars, although of essentially different temperament, always

His cordial
coöpera-
tion with
Chief
Justice
Mansfield. cordially coöperated in the discharge of their judicial duties; and Wilmot, instead of feeling any envy, was delighted that he was at liberty to act a very subordinate part.

He had soon to encounter anew the perils of promotion. On the resignation of Lord Hardwicke, the Great Seal was put into commission, and he was named as a commissioner along with Lord Chief Justice Willes and Sidney Stafford Smythe. He had never drawn a bill or answer in Chancery in his life,—but he was intimately acquainted with the Civil Law, and had scientifically studied every branch of English jurisprudence. All other cares being laid aside, he now devoted himself to Equity; and the old draughtsmen were obliged to acknowledge that, considering his defective training, he seemed to have by intuition a wonderfully correct notion of it. The rest of the profession and the public gave him unqualified praise, and a general expectation was entertained that he would soon be appointed Lord Chancellor or Lord Keeper, for he was not only much handier in dealing with the cases which came before the commissioners than either of his colleagues, but he was considered fitter for the office than Henley the Attorney General, or any one else who could pretend to it. Frightened out of his wits by the apprehension of the much-coveted bauble being offered to him, he thus wrote to his brother, Sir Robert Wilmot:

He is a
Commissioner of
the Great
Seal.
Nov. 19,
1756.

Unquali-
fied praise
given him.

“The acting junior of the commission is a spectre I started at, but the sustaining the office alone I must and will refuse at all events. I will not give up the peace of my mind to any earthly consideration whatever. Bread and water are nectar and ambrosia when contrasted with the supremacy of a court of justice.”

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For this turn there was not any serious ground for the alarm, for the promotion was only slightly proposed to him, and his refusal of it was easily acquiesced in. Political convenience prevailed over a strict consideration of the good of the suitors, and,—Chief Justice Willes having ruined himself by standing out for a peerage,—to please the Leicester House party, the Great Seal was delivered to Sir Robert Henley, afterwards created Earl of Northington.

His first refusal to be Chancellor, June 30, 1757.

The ex-commissioner gladly returned to the King's Bench, resolved never again, either jointly with others or singly, to touch the “pestiferous piece of metal.”¹

For ten years he went on as a Puisne Judge of the King's Bench, only longing for some situation in which he might be less subject to public gaze. On one occasion, while presiding at the Worcester Assizes, he had very nearly been released from all dread of further promotion in this world. The following letter to his wife gives the particulars of his danger and escape:

A.D. 1757—
1766.

His escape at the Worcester Assizes.

“I send this by express, on purpose to prevent your being frightened, in consequence of a most terrible accident at this place. Between two and three, as we were trying causes, a stack of chimneys blew upon the top of that part of the hall where I was sitting, and beat the roof down upon us; but, as I sat up close to the wall, I have escaped without the least hurt. When I saw it begin to yield and open, I despaired of my own life and the lives of all within the compass of the roof. Mr. John Lawes is killed, and the attorney in the cause which was trying is killed, and I am afraid some others: there were many wounded and bruised. It was the most frightful scene I ever

His letter to his wife giving the particulars.

1. Description of the Great Seal by Lord Keeper Guilford.

CHAP.
XXIX.

beheld. I was just beginning to sum up the evidence, in the cause which was trying, to the jury, and intending to go immediately after I had finished. Most of the counsel were gone, and they who remained in court are very little hurt, though they seemed to be in the place of greatest danger. If I am thus miraculously preserved for any good purpose, I rejoice at the event, and both you and the little ones will have reason to join with me in returning God thanks for this signal deliverance: but if I have escaped to lose either my honor or my virtue, I shall think, and you ought all to concur with me in thinking, that the escape is my greatest misfortune.

"I desire you will communicate this to my friends, lest the news of such a tragedy, which fame always magnifies, should affect them with fears for me.

"Two of the jurymen who were trying the cause are killed, and they are carrying dead and wounded bodies out of the ruins still."

In another letter he says, "It was an image of the last day, when there shall be no distinction of persons, for my robes did not make way for me. I believe an earthquake arose in the minds of most people, and there was an apprehension of the fall of the whole hall."

His safety is supposed to have been entirely owing to his presence of mind, which induced him to remain composedly in his place till the confusion was over—a circumstance which, with his usual modesty, he suppresses.

He twice attempted, ineffectually, to exchange his present office for that of Chief Justice of Chester, which was of less emolument, but would have withdrawn him entirely from London; so careless was he of present applause, or of the fame to be acquired as a great magistrate.

Offer made
to him to
become
Chief Jus-
tice of the
Common
Pleas.
A.D. 1766.

Afterwards, to the surprise of all who knew him, he did accept a distinguished "supremacy" in Westminster Hall; but he truly said that "this was under *duress*." On the formation of the first Rockingham administration, when Lord Camden became Chancellor, he resolved to have Sir Eardly Wilmot to succeed

him as Chief Justice of the Common Pleas. A rumor of this promotion having reached the person so selected as the worthiest, he wrote to his brother, Sir Robert—"Is it not possible for you to divert a measure which will be so injurious to my peace if accepted, and so much censured if refused?" But he received no comfort from the following answer:

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"The curtain is now drawn up; the actors are coming on the stage. I understand you have a part which, though not your own choice, has been assigned to you in so distinguished, so honorable a manner that you certainly ought, and gratefully, to accept it. 'Tis a duty which you owe to the King, to your friends, to your family, to yourself; and the duty required is neither hard nor unprofitable. Lord Camden claims the sole merit of your advancement; Lord Shelburne's¹ friendship for you may have had its weight; Lord Northington has likewise, probably, promoted the measure. Their motive is, your eminent abilities in your profession, your extensive knowledge, your acute and deep penetration, your sound judgment, your principles in favor of liberty, your unspotted character, and your being in every respect the most fit and proper person for that station. I am clearly of opinion that your remove to the Common Pleas will be a fortunate and happy event. You will, at all events, be a permanent pillar, though the new ministry, as it probably will, topple down. Every mortal says how honorable it is for you to have no competitor. The whole town seems

Aug. 2.
Letter
from his
brother to
persuade
him to
accept.

1. William Petty, Earl of Shelburne (1737-1805), an English statesman, who in early life entered the army and distinguished himself at the battles of Minden and Kampen. When George III. ascended the throne in 1760, he became the King's aide-de-camp, and subsequently reached the grade of major-general. At first a supporter of Bute, under whom he held office, his views relative to the impolicy of coercing the Americans led to his estrangement from that minister, and to his subsequent attachment to the Earl of Chatham, of whom he became an ardent admirer and unswerving supporter. In 1782 he was called upon to form an administration, and entered office with the declaration that he would adhere to all those "constitutional ideas which for seven years he had imbibed from his master in politics, the late Earl of Chatham." During his ministry, although it extended over only seven months, the siege of Gibraltar came to a glorious termination, and Howe and Rodney won their triumphs upon the seas. He retired from office in 1783, resigning the leadership of his party to William Pitt.—*Bacon's Biog. Dict.*

CHAP. interested and pleased with the event, and the hopes of mankind
XXIX. would be disappointed if you rejected the public voice. You shall have free scope to write, or talk, or scold as much as you please to me. Sit but serene in your Chief Seat, and out of it you shall rage like Boreas."

How he became a Chief Justice by *duress*.

But when Lord Camden's letter reached Sir Eardly, announcing that the King had graciously appointed him Chief Justice of the Common Pleas, his horror of promotion returned in full force. He was then on the Western Circuit; and he showed to Mr. Justice Yates, his brother judge, a letter he had written to refuse, with all respect and gratitude, the honor intended for him. This sensible and warm-hearted man, having in vain used many arguments to combat his resolution, at last made a little impression by urging that, as the Common Pleas had no criminal jurisdiction, and no state trials, a Chief there might be quieter and less observed than a Puisne in the King's Bench,—where Wilkes's outlawry was agitated, and "libel" was the staple commodity. He then, with his own hand, wrote a letter of acceptance, addressed to the Chancellor in Wilmot's name, and by gentle force induced him to sign it.

At the end of the circuit the new Chief Justice was sworn in as Chief Justice of the Common Pleas, and received the following congratulatory epistle from the friend whose *duress* had compelled him to suffer this elevation:

Aug. 30.
Letter of congratulation from Mr. Justice Yates.

' Clifton, Aug. 30, 1766.

" My dear Lord Chief Justice,—I have now the satisfaction of addressing my friend by the title I so ardently wished him; and, blessed as you are with the liveliest feelings of a friendly heart (one of the greatest blessings that man can enjoy), don't you envy me the joy I feel from this event? I should, indeed, have been heartily chagrined if you had missed it; and, had the fault been your own, should have thought you exceedingly blamable. My casuistry would then have been staggered

indeed, and would have found it a difficult point to excuse you. But now it is quite at peace and entirely satisfied. You do me great honor in rating it so high, and I am sure you speak from the heart. It is the privilege of friendship to commend, without the least suspicion of compliment; and I shall ever receive any approbation of *yours* with superior satisfaction. But no man breathing can have a surer guide or a higher sanction for his conduct than my friend's own excellent heart. Of this the very scruple you raised would alone have convinced me if I had no other proofs. I have not the least doubt that you will find your new seat as easy as you can wish, and *all* your coadjutors perfectly satisfied. There is but one of them that could entertain any thoughts of the same place for himself; and as he knows that in the present arrangement he had not the least chance of it, I dare say he will be pleased to see it so filled. And as to the rest of the profession, I can affirm with confidence (for you know I have but lately left the bar, where I had a general acquaintance with the sentiments of the Hall), that no man's promotion would have given so universal satisfaction as yours. I repeat this to you because it certainly must give you pleasure. Success is never more pleasing than when it is gained with honor and attended with a general good-will. It will rejoice me highly to shake your hand before I go northwards; and if I knew what day you would be at Bath, I would give you the meeting there. I long to hear a particular detail of everything that has passed.

"Your most affectionate friend,

"J. YATES."

Nauseated by the formal and fulsome letters addressed to him on this occasion, he was much pleased with the following from the celebrated "Commentator on the Laws of England,"¹ with whom he had always

1. Sir William Blackstone (1723-1780), legal writer and judge, was born in Cheapside, London, on July 10, 1723. In 1738 he was entered at Pembroke College, Oxford, and at the age of twenty composed a treatise on the elements of architecture. He also cultivated poetry, and obtained Mr. Benson's prize medal for the best verses on Milton. These pursuits, however, were abandoned for the study of the law, when he composed his well-known effusion called "The Lawyer's Farewell to his Muse." In 1740 he was entered at the Middle Temple, and in 1743 chosen Fellow of All Souls' College. In 1758 he printed "Considerations

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been on terms of familiarity and friendship, and who had himself fair pretensions to the promotion :

From
Judge
Black-
stone.

" My Lord,—Among the many congratulations you receive upon a promotion which everybody is pleased with, even in these times of division, there are none more sincere than those which come from your Lordship's acquaintance, who have an opportunity of contemplating your private as well as public character. As your Lordship has been pleased to honor me with that advantage in a degree that has laid infinite obligations upon me, you will believe that it is with real pleasure I felicitate both your Lordship and Westminster Hall on an event that does honor to both.

" I am, etc.

" W. BLACKSTONE."

The pros-
pect of a
quiet life
realized.

The prospect held out to him of a quiet life in the Common Pleas was realized, and he continued to repose upon the "cushion" there without any thing to disturb him till the terrible ministerial crisis in the beginning of the year 1770. Lord Chatham¹ having then

on Copyholders ;" and the same year was appointed Vinerian professor of the common law, his lectures in which capacity gave rise to his celebrated "Commentaries." In 1763 he was appointed Solicitor General to the Queen, and Bench of the Middle Temple. In the next year appeared the first volume of his "Commentaries," which was followed by three others. It is upon these that his fame now principally rests ; and, although opinion is divided as to the correctness and depth of the matter they contain, the beauty, precision, and elegance of their style have called forth universal admiration. In 1766 he resigned his places at Oxford. In 1770 he became one of the Judges in the Court of King's Bench, whence he removed to the Common Pleas. He now fixed his residence in London, and attended to the duties of his office with great application until overtaken by death.—*Beeton's Biog. Dict.*

1. William Pitt, Earl of Chatham, an illustrious English statesman and orator, born at Boconnoc, in Cornwall, November 15, 1708. He was educated at Eton, and at Trinity College, Oxford, which he entered at the age of seventeen. He began his political life as an opponent of the Walpole ministry. Having been excluded from the new cabinet which was formed on the resignation of Walpole in 1742, he continued to act with the Opposition, and fiercely denounced Carteret for the favor shown to the German dominions of George II. The offence which he thus gave to the King retarded his own promotion when, in 1744, the Pelhams came into power. By tendering their resignations in the critical period of the Jacobite rebellion, the ministers at last prevailed over the King, and Pitt was appointed Paymaster of the Forces in 1746. In 1754 the Pre-

unexpectedly reappeared upon the stage, Lord Camden's dismissal was only deferred till some lawyer of decent character could be prevailed upon to consent to be his successor.

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The first attempt was made upon Wilmot; and, as he happened to be in attendance in the House of Lords, the Duke of Grafton,¹ little dreading a rebuff, came up to him, and, pointing to the Great Seal, said, "There it is, Sir Eardly; you shall have it in your possession to-morrow." Sir Eardly shook his head and begged to be excused. The consequence was, the pressure upon Charles Yorke, to which that unhappy man fatally yielded. Immediately after his sudden

He again
refuses the
Great Seal.

mier, Henry Pelham, died, and was succeeded by his brother, the Duke of Newcastle. Pitt, who was perhaps offended because his rival, Henry Fox, was chosen Secretary of State, became the leader of the Opposition in November, 1755, soon after which date war broke out between England and France, Newcastle having been forced to resign, Pitt was Premier about five months, ending in April, 1757. The King, who disliked Pitt and his colleague Temple, dismissed them. After the nation had remained eleven weeks without a ministry, a coalition was formed between Pitt and Newcastle, the former of whom became Secretary of State, with the supreme direction of the war and of foreign affairs. About 1760 he was almost idolized by the people, who called him "The Great Commoner," and regarded him as the foremost Englishman of his time. On the accession of George III., Pitt was supplanted by Lord Bute, the royal favorite. He resigned in 1761, and received an annual pension of 3,000*l*. In 1765 the King requested him to resume the direction of affairs; but the latter declined, because his friend the Earl of Temple refused to take office with him. During the next session of Parliament he condemned the Stamp Act in an eloquent speech. In 1766 he was prevailed upon to form a new administration, in which he took the office of Privy Seal. In 1775 he made a brilliant speech on the American War. He died in 1778, being seized with an apoplectic fit as he rose to speak in the House of Lords.—*Kose's Biog. Dict.*

1. Augustus Henry Fitzroy, Duke of Grafton, succeeded his grandfather in the family honors in 1757, and in 1765 was appointed Secretary of State; but the year following relinquished that station, and soon after became First Lord of the Treasury, which office he held till 1770. During his administration he was virulently attacked by "Junius." In 1771 the Duke was nominated Lord Privy Seal, which office he resigned in 1775, and acted in opposition to the Court till 1782, when he was again in office for a short time. After this he was uniformly an opponent of ministers till his death. Born 1736; died 1811.—*Becton's Biog. Dict.*

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XXIX.Jan. 21,
1770.

death, the offer was repeated to Wilmot, with any peerage, pension, and reversion he might be pleased to name; but he was immovable, and the Great Seal was given in commission to Sir Sidney Stafford Smythe, Sir Richard Aston,¹ and the Honorable Henry Bathurst,² afterwards Lord Apsley.

A.D. 1771.

In the beginning of the following year, Lord North, having become Prime Minister, before committing the *clavis regni*³ to the incompetent hands of Bathurst, made another vigorous effort upon Wilmot, but found

1. Richard Aston belonged to the very ancient family of Aston of Aston in Cheshire, dating from the reign of Henry II., to the head of which Charles I. in 1628 granted a baronetcy. As a barrister, he was so successful in his practice that he attained in 1759 the rank of King's Counsel, from which he was advanced two years afterwards to the office of Chief Justice of the Common Pleas in Ireland. Here his career was unfortunate. He found that justice was very loosely administered, it being the common practice for grand juries to find the bills without examining witnesses, but upon the mere inspection of the depositions taken before the committing magistrate. Against this and other irregularities the Chief Justice naturally remonstrated; but his representations of the illegality of these proceedings produced no other effect than to create a prejudice against him, which was considerably heightened by the rude and overbearing manner in which he delivered his admonitions. These disputes frequently occurring, the Judge's position became so disagreeable that he solicited a removal. Accordingly, on the death of Sir Thomas Denison, he bade adieu to his Irish antagonists, and was transferred to the English Court of King's Bench on April 19, 1765, being at the same time knighted. On the sudden death of Lord Chancellor Yorke he was appointed one of the Commissioners of the Great Seal, on January 21, 1770. As neither of them had had much experience in equity, their rule was not a very distinguished one, and their decisions were supposed to be guided principally by Lord Mansfield's advice. Their trust terminated on January 23, 1771, when Sir Richard resumed his duties in the King's Bench, where he continued till his death, on March 1, 1778. He married, first, a daughter of — Eldred; and, secondly, Rebecca, daughter of Dr. Rowland, a physician of Aylesbury, and widow of Sir David Williams, Bart.; but he left no issue by either.—*Foss's Lives of the Judges*.

2. Henry Bathurst, second Earl Bathurst, and Lord Apsley, an English judge, son of Allen Bathurst, born in 1714. He was appointed a Judge in the Court of Common Pleas in 1754, and Lord Chancellor of England in 1770 or 1771. He resigned the Great Seal in 1778, and became President of the Council in 1780. Died in 1794.—*Thomas' Biog. Diet.*

3. "The key of the realm."

him still preferring quiet to the first place in his profession, to great wealth, to hereditary honors for his family, and to the opportunity of making an historical name for himself. Bathurst was, in consequence, appointed; and the sarcasm was elicited, that "what the three Lords Commissioners had been unable to do, was now to be done by the most incompetent of the three."

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To avoid all further solicitation, Wilmot resolved to resign his office, making infirm health the ground for his retirement. He had fretted himself into a temporary indisposition, during which he had got other judges to sit for him. Thus he addressed Lord Hardwicke:

He resigns
Justice-
ship.
Dec. 29.

"My health necessitates my retreat from public business; and all that I ask of his Majesty is, that he will be graciously pleased to accept my resignation, for I have observed that it may be communicated to the King in the most humble manner from me that I do not wish or mean to be an incumbrance to his Majesty by any provision out of his civil list. I would much rather resign without any remuneration at all. I hate and detest pensions, and living upon the public like an almsman."

By the special intervention of the King himself, a retired allowance was settled upon him; and in January, 1776, his resignation was accepted.

He survived above twenty years. That he might do something for the public money which he received, he long continued to hear appeals in the Privy Council; but the infirmities of age pressing upon him, he afterwards entirely devoted himself to the duties and enjoyments of private life. His principal occupation in retirement was superintending the education of his younger children. Thus he wrote to a boy of fifteen:

A.D. 1770
—1790.
Wilmot in
retirement.

"Second my endeavors to cultivate your mind and to impregnate it with the principles of honor and truth which constitute a gentleman. These I received in the utmost purity from

His letter
to his son
of fifteen.

CHAP. my own father, and will transmit to you and to your brothers
XXIX. unsullied. However fortune may exalt or depress you, the consciousness of having always acted upon these principles will give you the only perfect happiness that is to be found in this world. But, above all things, remember your duty to God, for without his blessing my love and affection for you will be as ineffectual to promote your happiness here as hereafter; and whether my heart be full of joy or of grief, it will always beat uniformly with unremitting wishes that all my children may be more distinguished for their goodness than their greatness."

He lived to see the sixth age shift

"Into the lean and slipper'd pantaloon,"

of which he gives the following description, almost as melancholy as that of our immortal dramatist: "I thought you would be glad to see, under my own hand, that I *exist* both in body and mind; but I can neither go nor stand, nor eat, nor sleep." His family and his friends had even to witness the sad spectacle of his passing through the

. . . "Last scene of all,
That ends this strange eventful history,
. . . second childishness and mere oblivion."

His death. From this he was released on the 5th of February,
Feb. 5, 1792, when he had reached his eighty-second year.
1792. His remains were interred in the parish church of Berkswell in Warwickshire, where a monument has been erected to his memory, which, according to his own directions, only gives the dates of his birth, of his death, and of the memorable events of his life.

The impartial biographer must say, that although Sir Eardly Wilmot never shone as an orator, a statesman, or an author, he is to be placed in a very high rank in the order of Judges. Beyond the common qualities of patience and purity, he had an extraordinary store of juridical knowledge, he saw with celerity the questions of law upon which the decision of each

His judicial
character.

case depended, and he disposed of these not only with perfect accuracy but with wonderful copiousness of illustration. He was not fortunate in his reporters, Burrow and Wilson;—but his son has published, from his own MSS., several of his judgments, which are very honorable to his memory. I can only give a few short specimens of his manner.

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His published judgments.

An action upon the case was brought for maliciously writing and publishing a libel upon the plaintiff in the following words, imputing to him that he was infected with a loathsome disease:

“Old Villiers, so strong of brimstone you smell,
As if not long since you had got out of hell.”

After a verdict for the plaintiff, a motion was made in arrest of judgment by Sergeant Burland, who argued that the words were not actionable; that the itch is a distemper to which every family is liable; that to have it is no crime; nor does it bring any disgrace upon a man, for it may be innocently caught or taken by infection;—that the smallpox and a putrid fever are worse disorders, yet no action would lie for saying that a person was ill of either of them.

Actionable to state in writing that a person has the itch.

Wilmot, C. J.: “I think this is a libel for which an action well lies. If any one maliciously publishes anything in writing concerning another which renders him ridiculous or tends to hinder mankind from associating with him, he is injured, and may have a recompense in damages. I see no difference between this case and saying that a man has the leprosy or the plague, for which it is admitted that an action lies. A writ may issue to the sheriff to remove him without delay *ad locum solitarium ad habitandum ibidem, prout moris est, ne per communem conversationem suam hominibus dampnum vel periculum eveniet quovismodo*.¹ Nobody will eat, drink, or have any intercourse with a person who has the itch and stinks of brimstone. Therefore I

1. “To a solitary place where he must dwell, according to custom, lest by his common conversation some danger or harm shall happen to men.”

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XXIX. think this libel actionable, and that judgment must be for the plaintiff."¹

Meaning,
in a policy,
of
"usurped
power." In an action on a policy of insurance on a malt-house burnt down by rioters, who, trying to reduce the price of provisions, for some time had possession of the town in which the insured building stood,—a question arose whether the insurance-office was exempted from liability by an exception in the policy of all fires which might happen by "any invasion, foreign enemy, or any military or *usurped power whatsoever*."

Wilmot, C. J.: "I am of opinion that the firing of the malt-house by the mob is not a fire by any usurped power within the meaning of the exception. Policies of insurance, like other deeds and instruments which evidence the agreements of men with one another, must be construed according to the true intent and meaning of the parties who make them. To find out this intention is often very difficult; for when agreements are committed to writing, all extrinsic evidence of intention is shut out; and words being the only marks of that intention, it happens that sometimes from the imperfection and poverty of language, and sometimes from the barbarous and inaccurate application of it, much doubt arises with respect to the ideas which the parties denote by the words they employ to express them. 'Usurped power' are two equivocal words which perplex this question, and, under such a difficulty, judges have no other clue to lead them out of the maze but to consider the import of the accompanying words, to take into consideration the general scope and design as well as the particular sentence in which the words occur. Above all things the popular and ordinary use of the words must be attended to. Usage is the master-key which unlocks the meaning of words:

"*Quem penes arbitrium est et jus et norma loquendi*."²

Having explained very copiously the nature of the fires by invasion, foreign enemies, and military operations, for which the insurers were not to be answerable, he thus proceeds: "In my

1. 2 Wilson, 463: *Villiers v. Monsley*.

2. "Usage which regulates the judgment is both the law and rule of speech."

opinion there is a prodigious difference between mobs and armies. The laws executed with spirit will always suppress a mob: the magistrates did with ease in this case. The undaunted courage of an individual, or the personal appearance of a man of credit and reputation, disperses or assuages these fevers of the people. Our own experience, as well as history, shows it according to that beautiful simile of Virgil:

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“Ac, veluti magno in populo quum sæpe coorta est
Seditio, sævitque animis ignobile vulgus;
Jamque faces et saxa volant; furor arma ministrat:
Tum, pietate gravem et meritis si forte virum quem
Conspexêre, silent, arrectisque auribus adstant;
Ille regit dictis animos, et pectora mulcet.”¹

Virgil's
simile.

Suppose a mob fire a house before they disperse, all hands are instantly employed to extinguish it; but neither the courage nor character of individuals can silence the thunder of cannon or prevent the bursting of bombs. To indemnify against the effect of rebellion and civil war may be too perilous an undertaking; but there seems no reason why an indemnity should not be promised against fires raised by a mob. These, though they may be the ruin of individuals, are not likely to occasion a loss beyond the means of a wealthy insurance company.”

One Puisne was of a contrary opinion—but the two others agreeing with the Chief Justice, there was judgment for the plaintiff, and the rule here laid down has been acted upon ever since.²

Sitting in the Exchequer Chamber, the question came before him whether a lady could maintain an action against a gentleman upon a deed by which he covenanted that he would not marry any other but her, under a penalty of 1,000*l*.

Qn. whether an action lies by a lady against a gentleman on a covenant to marry no one but her.

1. “As when sedition oft has stirred
In some great town the vulgar herd,
And brands and stones already fly—
For rage has weapons always nigh—
Then should some man of worth appear
Whose stainless virtue all revere,
They hush, they list; his clear voice rules
Their rebel wills, their anger cools.”

2. *Drinkwater v. Royal Exchange*, Wilm. Op. 282.

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Wilnot, C. J.: "Upon the first view of the question the maxim cited at the bar, *volenti non fit injuria*,¹ seems to favor such a covenant: every man has a right *disponere de suo jure*;² and as the law does not oblige anybody to marry, and leaves a free agency in that respect to every member of the community, it is not an agreement to omit what the law commands, but an agreement to omit what the law leaves to every man's choice to omit if he pleases. Besides obligations which are the subject of an action, every member of civil society is under a variety of moral obligations which municipal laws do not enforce; but which the law of nature, the law of God, calls upon him to perform. Gratitude, charity, and all parental and filial duties beyond mere maintenance; friendship, beneficence in all its various branches, and many more which might be named, are duties of perpetual, though imperfect, obligation; and I cannot name a greater than matrimony, being one of the first commands given by God to mankind after the creation, repeated again after the deluge, and ever since echoed by the voice of nature to all mankind. For the precept of multiplication has been always expounded by the civilized part of the world to mean multiplication by the medium of matrimony; and there cannot be a duty of greater importance to society, because it not only strengthens, preserves, and perpetuates it, but the peace, order, and decency of society depend upon protecting and encouraging it. The point therefore to be considered is, whether a covenant to omit such a duty ought to be enforced *in foro civili*.³ The writers upon the law of nature consider contracts to omit such duties as void; nay, they consider an oath to perform them as not obligatory.⁴ Will the law of this country, the perfection of human reason, enforce such a contract? Is a covenant to omit moral duties, which, for the exercise of our virtues, are left to our free choice, the proper subject-matter of an action? To entertain an action for the breach of such contracts, would be setting the laws of God and man at variance with one another. The celibacy of ecclesiastics, whether secular or religious, was a weed of the common law, erroneously tolerated by the common law and totally extirpated at the Reformation. The case of the

1. "No injustice is done to the consenting person," i.e., by a proceeding to which he consents.

2. "To dispose by his own right."

3. "In the civil court."

4. Grotius, lib. ii. cap. 13, s. 67.



JOHN WILKES.



fellows of colleges depends upon the will of the founder : there is a succession in colleges : it is only a temporary restraint on a few in seminaries of learning, which are not proper places for the reception of wives and children." After examining a vast number, he concludes by announcing the unanimous opinion of the Court that *the deed was void*.¹

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As the organ of the Common-Law Judges, Wilmot declared their opinion in the House of Lords in the famous case of John Wilkes,² on the question whether,

John
Wilkes's
Case.

1. *Low v. Peers*, Wilm. Op. 364. *Tamen quere*, for the covenant was substantially a mere promise to marry the plaintiff or pay her a sum of money, and therefore not in restraint of marriage; and the instrument being under seal, there was no necessity for a reciprocal obligation, or any other consideration, being expressed on the face of it.

2. John Wilkes, an English politician, born in London, Oct. 17, 1727, died there Dec. 27, 1797. He was the son of a rich distiller, and was educated at Hertford and Aylesbury, and afterwards studied at Leyden. In 1757 he entered Parliament, and in 1762 started the "North Briton" newspaper for the purpose of assailing the administration of Lord Bute. The King's speech at the close of Parliament in 1763 claimed for Great Britain the merit of the peace closing the Seven Years' War. The "North Briton" charged the monarch with falsehood. Wilkes was arrested and committed to the Tower, but in a few days was discharged by means of a writ of *habeas corpus*, on the plea of his privilege as member of Parliament. The House of Commons at the next session, however, declared the paper in question to be a seditious libel, ordered it to be burned, and passed a special law for the author's prosecution. The populace took up the side of Wilkes, and when the attempt was made to burn the obnoxious number, a riot ensued. Wilkes also won his suit against the Under-Secretary of State for the seizure of his papers, the jury giving him 1,000*l.* damages. In January, 1764, he was expelled from the House of Commons, and the Upper House having accused him of writing an obscene poem called an "Essay on Woman," he was tried before Lord Mansfield and found guilty, and as he had fled to France, was outlawed. He returned to England four years afterwards, and was again elected to Parliament from Middlesex. He now gave himself up to the Court of King's Bench, but it refused to commit him. Having been at once rearrested, he was rescued from the officers by the mob, but voluntarily went into confinement. The sentence of outlawry was reversed by Lord Mansfield; but Wilkes was convicted of two libels, fined 1,000*l.*, and sentenced to twenty-two months' imprisonment. Wilkes was again expelled from Parliament, and a new election was ordered for Middlesex. Wilkes was returned without opposition, but the House declared him incapable of sitting. Three other elections had the same result, and at last the Commons declared his opponent, Col. Luttrell, elected, on the ground that the votes cast for Wilkes were void. Wilkes, though in prison, now became the most popular man in England. His contest with the ministry was re-

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the office of Attorney General being vacant, the Solicitor General may file an *ex officio* information for a libel?

Power of
the Solicitor
General
when the
office of
Attorney
General is
vacant.

"By our constitution," said he, "the King is intrusted with the prosecution of all crimes which disturb the peace and order of society. He sustains the person of the whole community for the resenting and punishing of all offences which affect the community; and for that reason all proceedings *ad vindictam et poenam*¹ are called in the law 'the pleas or suits of the Crown.' In capital crimes these suits of the Crown must be founded upon the accusation of a grand jury; but in all inferior crimes an information by the King is equivalent to the accusation of a grand jury. He employs an officer to file the information in his name; but the accusation is the act of the King, the great constitutional guardian of the public peace. The arguing that the Attorney General only, and no other officer, was intrusted by the constitution to sue for the King either civilly or criminally, is a fundamental mistake. The Attorney General is intrusted by the King and not by the constitution; it is the King who is intrusted by the constitution." He then gives an antiquarian history of the office of Attorney General, showing how by the will of the sovereign it had gradually acquired its present dignity, and then proves that the Solicitor General has coördinate authority: "The Solicitor General is the *Secundarius Attornatus*; and as the Courts take notice judicially of the Attorney General when there is one, they take notice of the Solicitor General as standing in his place when there is none. He is a known and sworn officer of the Crown as much as the Attorney; and, in the vacancy of that office, does every act and executes every branch of it. When the Attorney dies or is removed, must the great criminal jurisdiction of this kingdom, in his department, be suspended till another is appointed? Where is it to be found that in this interval the noblest branch of the King's regal office becomes inactive, and the subject's right to protection is in abeyance?" He then cites many precedents in

guarded as one for the preservation of the rights of the people. Costly presents were sent to him, and 20,000*l.* was raised to pay his debts. In November, 1769, a jury gave him 4,000*l.* damages against Lord Halifax for false imprisonment. In April, 1770, he was set at liberty and elected alderman of London. From 1779 till his death he was Chamberlain of London.—*Appl. Encyc.*, vol. xvi. p. 624.

1. "For redress and punishment."



JOHN WILKES BEFORE THE COURT OF KING'S BENCH.
From a Print of 1768.



support of this opinion,—upon which the judgment against Wilkes was affirmed.¹ CHAP. XXIX.

I shall, further, only give a short extract from a judgment which he had written, but which was not delivered, in a case in which there was a summary application to the Court of King's Bench for an attachment against a bookseller who had published a pamphlet reflecting severely on Lord Mansfield and the other Judges of the court for their conduct in libel prosecutions instituted by the Crown. The doctrine he lays down, that, by the law of the land, courts may punish in a summary manner for *contempt*, instead of waiting for an indictment to be tried by a jury, is highly important, as it applies equally to the privilege of the two Houses of Parliament to follow a similar course :

“The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution ; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of the court ; and the issuing of attachments by the supreme courts of justice in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabric of the common law ; it is as much the *lex terræ*, and within the exception of Magna Charta, as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law ; there is no priority or posteriority to be found about it ; it cannot, therefore, be said to invade the common law ; it acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. Truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation as trial by jury ; it is a constitutional remedy in particular cases, and the judges in those cases

1. *Wilkes v. The King*, Wilm. Op. 322.

CHAP. are as much bound to give an activity to this part of the law as
XXIX. to any other."¹

Satire on
Chief Jus-
tice Wil-
mot by
Horace
Walpole.

Sir Eardly Wilmot seems to have been venerated in his own time. He is spoken of with harshness only by Horace Walpole, who, prejudiced against him (as is supposed) by party malignity, after observing that "he was much attached to Legge," adds, "He loved hunting and wine, and not his profession." But, as Wilmot was certainly dull, though of a solid understanding, the noble and fashionable memoir-writer could never have been in his company, and could have known very little about him, for he describes him as "a man of great vivacity of parts." He rarely indulged in wine, and "*case-hunting*" was the only sport in which he took delight.²

Character
of Chief
Justice
Wilmot by
his son.

The following character of him is drawn by his son, which, though colored by pious partiality, presents a striking likeness:

"His person was of the middle size; his countenance of a commanding and dignified aspect; his eye particularly lively and animated, tempered with great sweetness and benignity. His knowledge was extensive and profound, and, perhaps, nothing but his natural modesty prevented him from equalling the greatest of his predecessors. It was this invincible modesty which continually acted as a fetter upon his abilities and learning, and prevented their full exertion in the service of the public. Whenever any occasion arose that made it necessary for him to come forward (as was sometimes the case in the House of Lords, in the Court of Chancery, and in the Common Pleas), it was always with reluctance; to perform a duty, not to court applause, which had no charms for his pure and enlightened

1. *Rex v. Almond*, Wilm. Op. 243. In consequence of the resignation of Sir Fletcher Norton, who, as Attorney General, had made the motion, it was dropped, after cause shown, while the Court was considering of its judgment; and although there can be no doubt as to the power to proceed by attachment in such a case,—if a prosecution for a libel on judges be necessary, the preferable course is to proceed by information or indictment, so as to avoid placing them in the invidious situation of deciding where they may be supposed to be parties.

2. Mem. Geo. II., ii. 107.

mind. But although he was never fond of the practice of the law as a profession, he often declared his partiality for the study of it as a science: as an instance of this, after he had resigned his office he always bought and read the latest Reports, and sometimes borrowed MS. notes from young barristers. He was not only accomplished in the laws of his own country, but was also well versed in the civil law, which he studied when at Trinity Hall, Cambridge, and frequently affirmed that he had derived great advantage from it in the course of his profession. He considered an acquaintance with the principles of the civil law as the best introduction to the knowledge of law in general, as well as a leading feature in the laws of most nations of Europe. His knowledge, however, was by no means confined to his profession. He was a general scholar, but particularly conversant with those branches which had a near connection with his legal pursuits, such as history and antiquities. He was one of the original fellows of the Society of Antiquaries, when first incorporated in 1750, and frequently attended their meetings, both before and after his retirement: most of his leisure hours were spent in the above researches. But of all the parts of Sir Eardly's character, none was more conspicuous than the manner in which he conducted himself on the bench in that most delicate and important office of hearing causes, either of a criminal or civil nature. He was not only practically skilled in his profession, but his penetration was quick and not to be eluded; his attention constant and unabated; his elocution clear and harmonious; but, above all, his temper, moderation, patience, and impartiality were so distinguished, that the parties, solicitors, counsel, and audience went away informed and satisfied, if not contented,—*'etiam contra quos statuit, æquos placatosque dimisit.'* This was the case in questions of private property; but when any points of a public nature arose, there his superior abilities and public virtue were eminently characterized: equally free from courting ministerial favors or popular applause, he held the scale perfectly even between the Crown and the people, and thus became equally a favorite with both. This was conspicuous on many occasions, but particularly in the important cause, related before, between Mr. Wilkes and Lord Halifax,¹

CHAP.
XXIX.
Character
of Chief
Justice
Wilmot by
his son,
continued.

1. George Montague Dunk, fifth Earl of Halifax (*d.* 1771), was appointed Lord Lieutenant of Ireland in 1761, and a little later became one of Bute's Secretaries of State. When the last-mentioned nobleman went

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XXIX.
Character
of Chief
Justice
Wilmot by
his son,
continued.

in 1769. In private life he likewise excelled in all those qualities that render a man respected and beloved. May the remembrance and contemplation of his virtues inspire his descendants with a desire to imitate them ! This he would have thought the most grateful reward, this the noblest monument ! Such unaffected piety, such unblemished integrity, such cheerfulness of manners and sprightliness of wit, such disinterestedness of conduct and perfect freedom from party spirit, could not and did not fail of making him beloved, as well as admired, by all who knew him. Genuine and uniform humility was one of his most characteristic virtues. With superior talents from nature, improved by unremitting industry, and extensive learning, both in and out of his profession, he possessed such native humbleness of mind and simplicity of manners that no rank nor station ever made him think highly of himself or meanly of others. In short, when we contemplate his various excellencies, we find ourselves at a loss whether most to admire his deep and extensive learning and penetration as a lawyer ; his industry, probity, firmness, wisdom, and patience as a judge ; his taste and elegant accomplishments as a scholar ; his urbanity and refined sentiments as a gentleman ; or his piety and humility as a Christian."

Censure
on his
want of
ambition.

We must place him far above those who have been tempted, by inordinate ambition, to mean or wicked actions ; yet we cannot consider his public character as by any means approaching to perfection, for he was much more solicitous for his own ease than for the public good. By becoming a representative of the

out in March, 1763, Lord Halifax combined with Lord Egremont and George Grenville to form the administration popularly known as the Triumvirate. It was in the joint names of Lords Halifax and Egremont that the general warrant was made out for the arrest of Wilkes. Lord Halifax has also been charged with the authorship of the most fatal measure of this unfortunate administration, viz., the Stamp Act ; but though he was a warm advocate of the bill, as his office compelled him to be, there seems no evidence that he was the actual author of it. In 1765 he was a party with Lord Sandwich to the fraud which was practised on the King in order to make him agree to the omission of his mother's name from the Council of Regency ; and the King seems to have felt more deeply injured by him than by Lord Sandwich. The Grenville administration fell in 1765. When Lord North came into power (1770) he was appointed Secretary of State, but died the following year.—*Low and Pulling's Dict. of Eng. Hist.*

people, he might have materially assisted the House of Commons in its legislative deliberations. By accepting the Great Seal, he would have rescued the country from the incompetence of Bathurst, who, hardly qualified to be a chairman of Quarter Sessions, presided seven years on the woolsack. Filling the marble chair, what benefits might he not have conferred upon the community by his decisions, and by the amendment of our laws! He was deterred, not by any misgivings as to his own qualifications, or by any dislike to the political principles of those with whom he was to be associated in the Cabinet, but by morbid hatred of conspicuous position, and by selfish love of tranquillity. He did not shun political strife that he might make discoveries in science or contribute to the literary fame of his country. The tendency of the tastes by which he was animated is to make life not only inglorious, but useless.¹

I now come to a man who, animated by a noble ambition for power and fame, willingly acted a conspicuous part before the public for above half a century; who was a great benefactor, as well as ornament, to his own times; and whose services to a distant posterity will be rewarded by his name being held in honored remembrance.

1. The facts of this little memoir are almost all taken from a *Life of Sir John Eardly Wilmot*, published by his son in the year 1811. A few are added from the traditions of Westminster Hall.

CHAPTER XXX.

LIFE OF LORD MANSFIELD FROM HIS BIRTH TILL HE
WAS CALLED TO THE BAR.

CHAP.
XXX.

Qu. how
far Lord
Mansfield's
career is a
fit subject
for
biography?

AN indifferent author, who wished to write the Life of Lord Mansfield, having applied to him to be furnished with materials, "so that the brilliancy of such a splendid luminary of the law might never fade," received the following answer: "My success in life is not very remarkable: my father was a man of rank and fashion; early in life I was introduced into the best company, and my circumstances enabled me to support the character of a man of fortune. To these advantages I chiefly owe *my* success; and therefore my life cannot be very interesting; but, if you wish to employ your abilities in writing the life of a truly great and wonderful man in our profession, take the life of Lord Hardwicke for your subject; he was indeed a wonderful character; he became Chief Justice of England, and Chancellor, from his own abilities and virtues, for he was the son of a peasant."

His
chances
at birth.

Unless this may be excused as a mode of getting rid of an impertinent application from a coxcomb, it must be considered an ebullition of aristocratic insolence. The "*peasant*" was an eminent attorney in England; and, by birth, *his* son had an infinitely better chance of succeeding at the English bar, and reaching the highest dignities in Westminster Hall, than the son of a poor Scotch peer, of descent however illustrious. When the babe, afterwards Earl of Mansfield and Chief Justice of England, first saw the light at

Scone, the chances were many millions to one that he would never fill that office; and the probability was, that, if he was not cut off by some of the diseases of childhood, he would obscurely waste his days, like a true younger brother—with a contempt of trade and of books,—angling for salmon in the river Tay, and coursing the deer over the braes of Athol; or that he would languish as a subaltern in the army, without hope of promotion, in the service of King George; or (which was still more probable) that he would wander over Europe in exile and in indigence, as an adherent of King James, enjoying no prospect of celebrity except that which might accrue to him from being beheaded on Tower Hill.

His circumstances did *not* enable him “to support the character of a man of fortune,” and he did *not* owe his success to the advantages which he then enumerated. His life, therefore, is very interesting,—and it must be curious to trace the steps by which, after riding on a wretched pony from Perth to London, “he drank champagne with the wits;” he became the most distinguished advocate in England; he prosecuted Scotch peers, his cousins, for treason against King George; he was the rival of the elder Pitt, the greatest parliamentary orator England has ever produced; he was raised to be the highest Criminal Judge of the realm; he repeatedly refused the still more splendid office of Lord Chancellor; he, without political office, directed the measures of successive Cabinets; and (what was far truer glory) he framed the commercial code of his country.

There are other considerations which particularly excite me as I enter upon the life of LORD MANSFIELD. He was the first Scotchman who ever gained distinction in the profession of the law in England; and, though his education was English, the characteristics

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XXX.

Summary
of the
steps in
his career.

Sources of
interest to
the author
of this
memoir
in com-
posing it.

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of his race may have contributed to his success.¹ Being, like him, an English lawyer, I am proud of him when I reflect that he affords a rare example among us of a genuine taste for elegant literature, combined with a profound knowledge of jurisprudence. But, most of all, I look upon him with interest as a connecting link between the reign of Queen Anne and our own times. Having been the familiar friend of Pope, he was the familiar friend of my familiar friends.² Occupying the stage of political life almost for a century, he brings together systems as well as men that seem many generations asunder. After the expulsion of the Stuarts he saw the present dynasty placed upon the throne of Britain; and he lived to hear the news of the murder of Louis XVI., and to foresee and foretell all the evils which Europe has since suffered, and is suffering, from a violation of the principles of order and of true liberty.

In following the career of such a man, while we meet with striking vicissitudes affecting him individually, we must catch interesting glimpses of history and of manners. But I have too much raised expectation, and I must now expose myself to the peril of disappointing it.

Lord Mansfield was entitled to the consideration

1. Different trades and professions seem to suit the inhabitants of different countries. In London, all the milkmen are Welsh; all the sugar-bakers are German, and a great many of the tailors. The vast majority of the bakers are Scotch, but there is not a Scotch butcher to be found. While no tolerable theatrical performer ever came from Scotland, we have had considerable success in medicine and in law. To the literature of the country I trust it will be allowed that we have brought at least our fair contribution, when it is considered that there are less than 3,000,000 of inhabitants in Scotland, while there are 8,000,000 in Ireland, and 14,000,000 in England.

2. I may particularly instance the late Mr. Justice Allan Park and Lord Mansfield's kinsman the present Lord Murray, a judge of the Court of Session. My greatest boast in this line is, that I have conversed with Sir Isaac Herd, the celebrated HERALD, and he had conversed with a person who was present at the execution of Charles I.

which fairly belongs to distinguished ancestry. Setting aside the fabulous origin of his family from a great MORAVIAN chief, supposed in a very remote age to have conquered a province of Scotland now called *Morayshire*, we know, from authentic records, that *Friskinus de Moravia* was a powerful noble in the north of Scotland in the beginning of the twelfth century; and that *Gulielmus de Moravia*, his lineal descendant, by a charter of King Alexander III., dated 1284, was confirmed in the possession of the estates of Tullebardine, in the county of Perth, which he had obtained by marriage with the heiress of Malise, Seneschal of Strathearn. From him sprang a long line of Barons of Tullebardine, represented by the present Duke of Athol, chieftain of the Murrays.

A younger son of Sir William Murray, the eighth Baron of Tullebardine, was married to the Lady Janet Graham, daughter of the Earl of Montrose, and had several sons, who, though highly connected, were very poorly provided for, and seemed to have no resource for a subsistence but to join in an occasional *raid* on the lowlands, or to become tacksmen to the chief of the clan of a patch of land in a remote highland glen. This was probably the fate of all of them except one, for no mention is afterwards made of the others; and their descendants may be shoemakers at Perth, or may be sweeping the crossings of the streets in London, unconscious of any claim to noble ancestry. But David, the second son, became the founder of the Stormont branch of the family, and is the ancestor of the Earls of Mansfield.

Being remarkably well formed and athletic, he was enlisted, when very young, as a private in a small body of halberdiers, all of gentle blood, constituting the body-guard of James VI., who nominally had filled the Scottish throne from his infancy, while his mother,

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XXX.Lord
Mansfield's
illustrious
descent.Founder of
the Stormont
Murrays.David, 1st
Viscount
Stormont.

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Mary, the rightful sovereign, was a captive in a foreign land, and successive factions governed in his name. The identical passion for handsome favorites, which afterwards raised the Earl of Somerset and the Duke of Buckingham to such unfortunate distinction in England, showed itself in the Scottish monarch in early youth. Caught by the good looks, pleasing manners, and skill in all sorts of games which he discovered in David Murray, he made him his companion, knighted him, and promoted him to be Master of the Horse, Comptroller of the Household, and Captain of the Body-guard.

A.D. 1600.

His ser-
vices in
securing
the Earl of
Gowrie.

It so happened that the favorite was in attendance on his royal patron in the castle of the Earl of Gowrie,¹ at Perth, when that *conspirator* (for such, after long controversy, I fear he is now proved to have been) attempted to make the King a prisoner, with the view of getting all the power of the state into his own hands.² Sir David Murray displayed great presence of mind upon the occasion, and gave important assistance in rescuing the King and securing the traitors. He soon afterwards gallantly quelled an insurrection of the inhabitants of Perth and the surrounding country, who idolized the young Earl of Gowrie and had risen to avenge his death. For these services a considerable portion of the forfeited estates of that nobleman was

1. John Ruthven, Earl of Gowrie, born about 1578, was a son of William Ruthven. He and his brother Alexander were the chief actors in the mysterious affair called the Gowrie Conspiracy. In 1600 King James was induced to visit the Earl in his castle at Perth, and an attempt was made against his liberty or life by the Ruthvens, who were both killed by the King's attendants.—*Thomas' Biog. Dict.*

2. I wish I could have defended him from this charge, as he was the heir and representative of the Lords Hallyburton, from whom I am descended; but, in spite of the many volumes which have been written on the Gowrie Conspiracy to prove that JAMES got up a sham plot to wreak his vengeance on a family he had devoted to destruction, I think there can no longer be a doubt that the plot was real, and that he had very nearly been the victim of it.

bestowed upon him. The site of the ancient Abbey of Scone,¹—where the kings of Scotland had been crowned from the remotest antiquity, and where stood, till it was removed to Westminster by Edward I., the famous stone on which they were anointed,—had been granted to the Earl, after the sacred edifice itself had been burnt to the ground by the reformers;—and here he was erecting a new castle, or PALACE (as it was called, from royal recollections), at the time of his attainder. This became part of the possessions of the new favorite, who completed the structure, and was designated Lord Scone, the property having been erected into a temporal barony. He continued in high favor at court till James's accession to the throne of England; and, although he was then cast off for other minions, he was afterwards, by letters patent bearing date 16th of August, 1621, created Viscount Stormont.² This title, long borne by his descendants in the lineal male line, was absorbed by the earldom, which a *cadet* won by very different arts and achievements.

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XXX.

He is designated
Lord
Scone.

A.D. 1621.

For several generations following, the family were distinguished by extravagance rather than by talent or enterprise, and a large portion of the possessions which they had received from the bounty of King James VI. had been alienated. In the time of the fifth Viscount

1. Scone, situated on the east bank of the Tay, in the old district of Gowrie, became the capital of the Pictish kingdom, and continued to be regarded as the seat of royalty in later history. The Moot Hill, or Hill of Belief, at Scone was the place of assembly for the King's counsellors, and it was at Scone that the Coronation Stone, or Stone of Destiny, was "reverently kept for the consecration of the Kings of Alban" until it was removed to Westminster by Edward I. In 729 Scone was the scene of a conflict between Alpin, King of the Picts, and Nectan. Many of the later kings of Scotland, notably Malcolm Canmore, Alexander III., Robert Bruce, Robert II., and James I., were crowned there, as well as Charles II. in 1651.—*Low and Pulling's Dict. of Eng. Hist.*

2. There may still be seen in the adjoining church a fine marble monument over his tomb, representing him, as large as life, in a kneeling posture, and in complete armor.

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XXX.
5th Vis-
count
Stormont.

little remained to them beyond the Castle of Scone, which, in a dilapidated condition, frowned over the Tay in the midst of scenery which for the combination of richness and picturesque beauty is unsurpassed. He had married the only daughter of David Scot, of Scotstarvet, the heir male of the Scots of Buccleugh; but had received a very slender portion with her, as their vast possessions had gone with the daughter of the last Earl, married to the Duke of Monmouth. To add to the difficulties of the poverty-stricken Viscount, his wife, although of small fortune, was of wonderful fecundity, and she brought him no fewer than fourteen children. For these high-born imps oatmeal porridge was the principal food which he could provide, except during the season for catching salmon, of which a fishery near his house, belonging to his estate, brought them a plentiful supply.

Birth of
William
Murray,
afterwards
Earl of
Mansfield.
March 2,
1705.

William, the eleventh child and fourth son of this brood, destined to be Chief Justice of England, was born in the ruinous Castle of Scone on the 2d day of March, 1705.¹ I do not read that his mother had any prophetic dream while she carried him in her bosom, or that any witch or wizard with second-sight foretold his coming greatness. He muled and puked like other children, and when it was time that he should be taught his letters he was sent to a school at Perth, only a mile and a half from his father's residence, where he ran about with the sons of the surrounding gentry and of the citizens and tradesmen of the town, all barefooted, and speaking a dialect which was not *Gaelic*, for Perth was always within the boundary which separated the Lowlands of Scotland from the Highlands, but which was a *patois* hardly to be called Anglo-Saxon.²

1. The date is usually given 1704, but this is according to the old style.

2. A very circumstantial account of his infancy was given by his nurse,

Holliday,—who, although he had every advantage in writing the Life of Lord Mansfield, being himself a lawyer in extensive business, having often practised before him, and having been honored with his friendship, has left us the worst specimen of biography to be found in any language,—says, “About the tender age of three years he was removed to, and educated in, London, and, consequently, he had not, when an infant, imbibed any peculiarity of dialect.” This statement has been followed by all the subsequent biographers of Lord Mansfield, and has been assumed for truth by all who have since referred to his early career. According to Boswell,¹ “Dr. Johnson would not allow Scotland to derive any credit from Lord Mansfield, as he had been reared in England; observing, ‘Much may be made of a Scotchman if he be

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XXX.
Refutation
of the oft-
told tale
that he was
removed to
England in
his infancy.

who died in 1790, in the parish of Monimail, in Fife, at the age of 105. She usually concluded her narrative by observing that “Mister Willie was a very fine laddie.” See Sir John Sinclair’s Statistical Account of Scotland, ii. 404.

1. James Boswell, a Scottish lawyer and famous biographer, born at Edinburgh in 1740, was a son of the Laird of Auchinleck (pronounced afflek). He published in 1763 a volume of Letters which had passed between himself and Andrew Erskine, and was introduced to Dr. Johnson in the same year. He afterwards made a tour in France, Germany, and Italy, and returned home in 1766, a warm admirer of Paoli, whom he had visited. He is said to have exhibited himself in public with a placard on his hat bearing the inscription of *Corsica Boswell*, and he published in 1768 a “Journal of a Tour in Corsica.” Having become intimate with Dr. Johnson, he made a journey with him to the Western Islands in 1773. His vanity, curiosity, or other questionable motive, prompted him to seek the society of eminent men, and not unfrequently rendered him the laughingstock of those whose favor he courted. Dr. Johnson said that Boswell had missed his only chance of immortality by not having been alive when the “Dunciad” was written. His “Life of Johnson” (2 vols., 1791) was received with great favor. “The ‘Life of Johnson,’” says Macaulay, “is assuredly a great, a very great work. Homer is not more decidedly the first of heroic poets, Shakspeare is not more decidedly the first of dramatists, . . . than Boswell is the first of biographers. He has no second. . . . We are not sure that there is in the whole history of the human intellect so strange a phenomenon as this book. Many of the greatest men that ever lived have written biography. Boswell was one of the smallest men that ever lived, and he has beaten them all.” Died in 1795.—*Thomas’ Biog. Dict.*

CHAP. XXX. *caught* young.'” But I have ascertained from his near kinsmen, who speak from family papers, that the story of his being thus *caught* and *tamed* is pure invention. He remained at the grammar-school at Perth till he was in his fourteenth year,—when he went to Westminster. Afterwards, by constant pains with his pronunciation, and by never returning to visit his native country, he did almost entirely get rid of his Scottish accent; but there were some *shibboleth* words which he could never pronounce properly to his dying day, and which showed that his organs of speech had contracted some rigidity, or his organs of hearing some dulness, before his expatriation. For example, he converted *regiment* into *reg'ment*; at dinner he asked not for *bread* but for *brid*; and in calling over the bar he did not say “Mr. *Solicitor*,” but “Mr. *Soleester*, will you move any thing?”

Words which he could never learn to pronounce like an Englishman,

Fable of his having been educated at Lichfield.

Willie Murray at Perth School. A.D. 1710—1713.

His knowledge of Latin and Greek.

I need hardly notice the equally unfounded story that he was at Lichfield School along with Lord Chancellor Northington, Chief Justice Willes, Chief Justice Wilmot, Chief Baron Parker, Sir Thomas Clarke, Master of the Rolls, and a herd of Puisne Judges, who are supposed to have there played together at taw, and afterwards simultaneously and exclusively to have presided in Westminster Hall. Instead of such amusing wonders, I am obliged to state that he spent his boyhood among companions whom he never afterwards met, or much wished to meet again. However, Latin was infinitely better taught then in the grammar-schools of Scotland than at the present day; and young Willie Murray could not only translate Sallust and Horace with ease, but had learned a great part of them by heart,—could converse fluently in Latin,—could write Latin prose correctly and idiomatically,—and even could have contributed Latin verses to the *DELICIE POETARUM*

SCOTORUM, a collection of modern Latin poems which had been published not long before in Edinburgh, and which must be allowed to be much superior to the MUSE ETONENSES or the ARUNDINES CAMI.¹ In Greek he made little progress beyond learning the characters and the declensions.²

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XXX.

But there was another foreign language which he was taught grammatically, and which he was supposed to speak and to write with wonderful facility and accuracy. Pure English was laboriously attended to at Perth School, both in reading and composition; its rules and its irregularities were fully explained, and the writing of an English essay was an exercise required from the boys at the peril of the *ferula*. Lord Mansfield, in his old age, was often heard to declare that when at Westminster and at Oxford, and even when contending with rivals in public life, he had enjoyed an essential advantage from this discipline, as he discovered that in England, while they wasted many years on Latin and Greek prosody, they almost entirely neglected the scientific cultivation of their mother tongue; and he found eminent lawyers and statesmen who, when forced to commit their thoughts to writing, showed that they had no notion of the division of English prose into sentences, and who,

His in-
struction in
English.

1. I have often been at a loss to understand how Latin versification, which had flourished in Scotland so much in the 16th and 17th centuries, disappeared so completely in the 18th. When I was a boy, although the habit of composing Latin prose was well kept up, I do not believe that in all Scotland there was either a schoolboy or a schoolmaster who, to save his life, could have written in Latin an *alcaic ode*, or twenty hexameters and pentameters alternately. The practice of speaking Latin still prevailed. There has since been an attempt at a *revival*, and Latin versification is practised at the High School of Edinburgh, and other classical seminaries, —but, if we may judge from the “*Musæ Edinenses*,” not as yet with very great success.

2. I am sorry to say that Greek has at no time been cultivated in Scotland as this noble dialect deserves, although it has been much more attended to of late years, since professors bred at Oxford and Cambridge have been elected to the Greek chairs in the Scotch universities.

CHAP. XXX. though decently well acquainted with orthography, set at utter defiance the rules of grammar.

His high character at Perth School,

Willie Murray, according to the tradition in his family, while going through the school at Perth, displayed the sharpness of intellect, the power of application, and the regularity of conduct which distinguished him in his after-career. He was almost always *Dux*, or head of his class; and, albeit that, according to the custom of the age, flagellation with the *taw*s was administered even for small faults, his hand remained without a blister.¹

A.D. 1713
—1718.

Till the year 1713, Lord and Lady Stormont continuing to reside in the palace at Scone, Willie lived at home with them, and he daily walked or rode on a pony to school,—thus combining, in the Scottish fashion, the advantages of public education and of domestic discipline. But, for the sake of economy, the family was then moved to a small house at Cam-lougan, in the county of Dumfries; and Willie and a younger brother, Charles, were boarded with Mr. Martine, the master of the grammar-school at Perth, who received for them a yearly payment in money and a certain allowance of oatmeal. The following items respecting them, which I have extracted from the accounts of Mr. Barclay, a writer to the signet, Lord Stormont's Edinburgh agent, may amuse the reader:

Items in family accounts for books, etc., for him while he was a schoolboy.

			£	s.	d.
" 1715.	May 25.	Item.—Sent to Scone per Lady's letter for <i>Mr. William</i> , CÆSARIS COMMENTARIUS	1	04	00 ²
1717.	Aug. 8.	Item.—At order bought of <i>Mr. Freebairn</i> for <i>Mr. William</i> , my Lord's son, TITUS LIVIUS, in a great folio			

1. Instead of the *birch* applied to another part of the person, in English fashion, the Scots have adopted the punishment which made good scholars at Rome,—

"Et nos ergo manum ferule subduximus."

2. On examining this account I was much surprised at the seeming

		£	s.	d.	CHAP. XXX.
	and large print, for 20s. Sterlin, sent to Perth by <i>Walker</i> the carrier	6	00	00	
— June 24.	<i>Item</i> .—Paid to <i>Mr. John Martine</i> for <i>Mr. William</i> and <i>Charles</i> , ther quarter payment and for their board from 17th June to 17th Sept. p ^r receipt	60	00	00	
— July 13.	<i>It</i> .—Paid to <i>Charles Melvill</i> , merch ^t . in Perth, a year's chamber meal for <i>Mr. William</i> and <i>Mr. Charles</i> as p ^r discharge to Whyts. 1717.	18	00	00	
— Aug. 16.	<i>It</i> .—For cutting <i>Mr. William</i> and <i>Charles</i> hair	0	12	00	
— Sept. 24.	<i>It</i> .—To a Perth carrier for bringing over books from Ed ^r to <i>Mr. Will-</i> <i>iam</i>	00	06	00	
	<i>It</i> .—Given out by the Compter for <i>Mr. William</i> and <i>Charles</i> , as p ^r particular account	35	19	00	
	<i>It</i> .—For a pair of boots for <i>Mr. William</i>	03	12	00	
— Nov. 14.	Letters from <i>Mr. William Murray</i> , my Lord's son, with one inclosed to his sister <i>Amelie</i>	00	02	00	
— Nov. 19.	A letter from <i>Mr. William</i> with one inclosed to my lady from <i>St. An-</i> <i>draws</i>	00	02	00	

When Mr. Solicitor General Murray was afterwards rising into greatness, envious libels upon him sarcastically referred to his early education, and the following graphic account was given of his schooling at Perth :

“ Learning was very cheap in his country, as it might be had for a groat a quarter, so that a lad went two or three miles of a morning to fetch it ; and it is very common to see there a boy of <sup>Account of his school-
ing at Perth.</sup> *quality* lug along his books to school, and a scrip of oatmeal for his dinner, with a pair of brogues on his feet, posteriors exposed, and nothing on his legs.”¹

enormously high price of books in Scotland in the beginning of the last century, till I discovered that it is kept in Scottish currency—by which the pound, which was once the same all over Europe, being a pound of silver according to the standard of Troyes, and was reduced in England to one third of its original value,—in France to 10*d.*,—was reduced in Scotland to 1*s.* 8*d.* of English currency ;—so that the price of CÆSAR'S COMMENTARIES, instead of being 1*l.* 4*s.*, was only 2*s.* Of course all the other items are to be lowered in proportion.

1. Pamphlet entitled “ BROADBOTTOM.”

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XXX.
Delibera-
tions re-
specting
his further
education
and his
profession.

Willie Murray approaching his fourteenth year, the time was at hand when, according to the system of education then and still subsisting in Scotland, he was supposed to have learned all that could be acquired at school, and it was in contemplation to send him to the neighboring University of St. Andrew's, where some remains of the passion for classical learning, kindled by George Buchanan when Principal of St. Leonard's College, still lingered.¹

Much perplexity existed in the family with respect to the choice of a profession for him. His father, although he had not joined the Earl of Mar² or fought at Killiecrankie, was a decided Jacobite, and his brother James had followed the Stuarts into exile. There was, therefore, little hope of promotion for any

1. Having heard a surmise that he actually studied at St. Andrew's during the session 1717-18, I caused a search to be made, through the kindness of my friend Sir David Brewster, Principal of the United College of St. Saviour's and St. Leonard's there—but the only matriculation of any of the family to be found is that of his brother Charles: "Charles Murray fil: Vicecomitis de Stormont, matriculated in Coll. D. Leonardi. 1721."

2. John Erskine, eleventh Earl of Mar (*d.* 1732), entered public life early in Queen Anne's reign as a Whig, but soon joined the Tory party. His trimming policy obtained for him the nickname of "Bobbing John." He joined the Whigs in advocating the Scotch Union, and in 1706 was Secretary of State to the Duke of Queensberry at the last session of the Scotch Parliament. In 1710 he became Secretary of State and Manager for Scotland under the Tory administration. On the accession of George I. he was deprived of office, and at once plunged into Jacobite intrigues. The Pretender's standard was raised by him at Braemar on September 6. He was at once joined by Tuliebardine, heir of the Duke of Athol, the Gordons, and other clans, and was at the head of 12,000 badly-armed men. A detachment under Brigadier Macintosh was sent to surprise Edinburgh, and was ultimately defeated at Preston. At Sheriffmuir he encountered the royal troops under Argyle, and after an undecided battle Argyle withdrew from the field. In January the Pretender, after long delay, appeared in Scotland. But his presence infused no energy in the army. They withdrew from Perth to Montrose, and from thence Mar and James Edward stole off to France, deserting their followers. He continued in favor with the Pretender, and succeeded in inducing him to dismiss Bolingbroke from his councils. In 1719 Mar was arrested, by orders of the English Government, at Geneva.—*Low and Pulling's Dict. of Eng. Hist.*

of the family from Court favor as long as the house of Hanover should keep possession of the throne. The Church offered no resource: for the Nonjuring Episcopalians were not even tolerated, and few of the Presbyterian livings reached 100*l.* a year. The law was more hopeful, but, from its being the only civil profession in Scotland deemed fit for a gentleman, the numbers who followed it bore a fearful proportion to its emoluments.

Upon this subject Lord Stormont consulted James,¹ his brother James, created by the Pretender Earl of Dunbar, his second son, with whom, although now avowedly belonging to the court of the Pretender, and created by the banished sovereign EARL OF DUNBAR, he still indirectly kept up an affectionate intercourse.

This gentleman, who is said to have possessed the same shining abilities and silver-toned voice as William, when he had reached his eightieth year died an outlaw,¹ but during the early portion of his exile he no doubt expected, like another Clarendon, to see the legitimate heir restored to the throne and to rule Britain in his name. He had been bred to the bar in Scotland, and probably would have gained great forensic eminence had it not been that in the year 1710, before he had made much progress in his profession, he was returned to the House of Commons as representative for the Elgin district of burghs. He thereupon went up to London, and enlisted himself under the banner of Bolingbroke, professedly belonging to the high-Tory and secretly abetting the Jacobite cause. He was thus naturally introduced to Bishop Atterbury, then Dean of Westminster, and by political sympathy he gained the confidence of this daring prelate, who, when others quailed, himself offered in his lawn sleeves to proclaim James III. When, at the

1. He died at Avignon in 1770, and was fifteen years older than Lord Mansfield.

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death of Queen Anne, Bolingbroke's plot to bring in her brother failed, and George I. quietly succeeded as if by hereditary right, James Murray followed the example of his leader, and, much more steady and trustworthy, he always remained true to the Stuarts, notwithstanding their imbecility and their bigotry. He hoped to draw over his brother William, of whose sprightly parts he had heard much, to the same side. For this purpose he thought there could be no means so effectual as having him educated under the auspices of Atterbury. He therefore wrote back to his father a flaming account of Westminster School,—mentioned the distinguished men he had become acquainted with who had been reared there,—stated that, with proper management, the expense of starting a boy there was not considerable,—hinted at the interest he still had which might be made available to have Willie put upon the foundation as a King's scholar,—pointed out the certainty of his obtaining a scholarship at Christchurch,—and showed how, in that case, every thing would be open to him in the church and in the state.

A.D. 1718.
He advises
that Willie
should be
sent to
Westmin-
ster.

The plan seemed so feasible, that at a family council it was unanimously approved of, and Willie was delighted with the prospect of speedily seeing all the wonders of London instead of pining in the gloomy cloisters of St. Andrew's, or being overpowered by black smoke and bad smells in *Auld Reekie*.

Willie to
ride thither
on a pony.

He was to perform the whole journey on horseback,—riding the same horse. Post-horses were not established till long after. There were then two or three times a month traders from Leith to the river Thames, in which passengers might be accommodated; but, if the wind was foul, they were sometimes six weeks on the way. A coach, advertised to run once a week from the Black Bull in the Canongate to the Bull and Mouth in St. Martin's le Grand, did not

promise to arrive before the tenth day, and, besides being very incommodious, was very expensive. Mr. William was therefore to be carried on the back of a "Galloway," or pony which my Lord had bred, and which was to be sold on his arrival in the great city to help to pay the expenses of his outfit there.

On the 15th of March, 1718, he joyfully bade adieu to Mr. Martine and his school at Perth, and expected easily to reach Edinburgh the same day; but near the Queen's Ferry the horse fell lame, and it was necessary to leave him behind, the rider travelling the rest of the stage on foot.

Having completed his equipment at a shop in the Luckinbooths, and his horse being again sound and serviceable, on Saturday, March 22d, he left Edinburgh for Camlongan, where he was to take leave of his parents.¹

We have no information respecting the parting scene; but we need not doubt that it was very tender on both sides. An assertion may be hazarded that much good advice was given, and that warm promises of good conduct were sincerely reiterated. An old ash-tree is still shown in Dumfries-shire under which, according to tradition, Lord Mansfield received his father's blessing. It is a melancholy fact that he never saw either parent more.

1. I find the following entries in Mr. Barclay's accounts connected with these occurrences; but they add very little to the information we have from other sources:

"1718. March 22. Mr. W^m, my Lord's son, taking journey here this day for Camlongan—payd by me at the stable to a ferrier for the horse brought in lame here by Cameron on Sunday the 16th under coure till this day, 4s. Ster. £2 08 00

It. Att Corsons Lord Inverurie's governour Denbres' 2 sons and governour conveying Mr. W^m. to his horse payed be Sandie Orane for morning drink . . . £3 8

NOTA Mr. W^m. payed 9s. Ster. for keeping the horses att Robt Corsons himself."

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XXX.

He bids
adieu to
his native
country.
March 15.

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XXX.
His
journey.

But whatever forebodings he may have had, they were soon dispelled when he found himself on the high-road leading from Dumfries to Carlisle,—when he felt he was his own master,—when he told over the money with which he was intrusted to pay his expenses on the way,—when he thought of the various counties through which he was to pass, some of which were greater than Perthshire, which he had considered sufficient for an empire,—when he figured to himself the King he was soon to see with a golden crown on his head,—and when his bosom swelled with the proud certainty that he could never more be in danger of the *taws*. As we imagine him to ourselves trotting along and communing with himself, it is impossible not to be struck with the similarity of his situation to that of Gil Blas,¹ when this unlucky youth, having received the blessing of his parents, started on his uncle's mule from Oviedo on the road to Pegnaflor, with the intention of studying at the University of Salamanca. But the Scotsman had much less vanity and much more prudence. Therefore he was not mystified by a parasite, he was not cheated of his horse, he did not become a companion of highwaymen, and he safely reached his destination. The only particulars that we know of his journey are, that he slept the first night at Gretna Green,² which had not yet acquired its hyemeneal reputation, English runaway marriages then and long after being celebrated in the Fleet³ and May-

1. The title of a famous romance by Le Sage (1668-1747), and the name of its hero, by whom, and with whose commentaries, the story is professedly told.—*Wheeler's Dict. of the Noted Names of Fiction*.

2. Gretna Green is a little village in Scotland much resorted to formerly by runaway couples from England. Marriages were here celebrated with very little ceremony, but of late they have been prohibited by act of Parliament.—*Wheeler's Familiar Allusions*.

3. The precincts of the prison were long celebrated for the notorious "Fleet marriages," which were performed, without license or publication of banns, by a set of vicious clergymen confined in the prison for debt, and therefore free from fear of the fine of 100*l.* usually inflicted on clergy-

fair,¹—and that he was much struck, the following day, with the fortifications of Carlisle, which appeared formidable to an unmilitary eye, although a few years later the place, after a short siege, surrendered, first to Prince Charles and then to the Duke of Cumberland. He followed the same route which was taken by the rebels as far as Derby, and if they had boldly dashed on, as he still did, they might, like him, have carried all before them in London.

men convicted of solemnizing clandestine marriages. No less than 217 marriages are shown by the Fleet registers to have been sometimes celebrated there in one day ! The "marrying houses," as they were called, were generally kept by the turnkeys of the prison, and the different degraded clergymen of the Fleet maintained touts in the street to beguile any arriving lovers to their especial patrons. Pennant, walking past the Fleet in his youth, was often tempted with the question, "Sir, will you be pleased to walk in and be married?"—*Hare's Walks in London*.

1. This spot, which embraces in its somewhat vague and undefined area the present Curzon Street, Hertford Street, and Chesterfield House and gardens, took its name, in the days of Edward I., from an annual fair which that King privileged the hospital of St. James's to keep "on the eve of St. James, the day, and the morrow, and four days following." In the days of George I. and George II. there was a chapel here for the celebration of private and secret marriages. It stood within a few yards of the present chapel in Curzon Street. It was presided over by a clergyman, Dr. George Keith, who advertised his business in the daily newspapers, and, in the words of Horace Walpole, made "a very bishopric of revenue." This worthy parson having contrived for a long time to defy the Bishop of London and the authorities of church and state, was at length excommunicated for "contempt" of the Church of which he was a minister; but he was impudent enough to turn the tables upon his superior, and to hurl a sentence of excommunication at the head of his bishop, Dr. Gibson, and the judge of the Ecclesiastical Court. Keith was sent to prison, where he remained for several years. His "shop," however, as he called it, continued to flourish under his curates, who acted as "shopmen," and the public was kept daily apprised of its situation and its tariff, as witness the following advertisement in the *Daily Post* of July 20, 1744: "To prevent mistakes, the little new chapel in May Fair, near Hyde Park corner, is in the corner house, opposite to the city side of the great chapel, and within ten yards of it, and the minister and clerk live in the same corner house where the little chapel is; and the license on a crown stamp, minister and clerk's fees, together with the certificate, amount to one guinea, as heretofore, at any hour till four in the afternoon. And that it may be better known, there is a porch at the door like a country church porch."—*Walford's Old and New London*, vol. iv. p. 345.

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XXX.
His arrival
in London,
May 8.
Received
and taken
care of by
a Scotch
apothecary.

His long, but not wearisome, journey was concluded on the 8th of May, 1718. He had been consigned to the care of one *John Wemyss*, an emigrant from Perth, who had settled in London as an apothecary, and had thriven there very much by his skill, attentiveness, and civility. This canny Scot had been born on the Stormont estate, and was most eager to have it in his power to be of service to any of that family. He did all that was necessary to launch *Mr. William* in London, by assisting him to sell his horse, by advancing him money and making payments for him, by buying him a sword, two wigs, and proper clothes, by entering him with the head master of Westminster School,¹ and

1. Westminster School was originally founded by Henry VIII., and was richly endowed by Queen Elizabeth in 1560. The schoolroom was the dormitory of the monastery, and is ninety-six feet long and thirty-four broad. High up, across the middle of the schoolroom, an iron bar divides the upper and lower schools. Over this bar, by an ancient custom, the college cook or her deputy tosses a stiffly-made pancake on Shrove Tuesday. The boys on the other side of the bar struggle to catch it, and if any boy can not only catch it but convey it away intact from all competitors to the head master's house (a difficult feat), he can claim a guinea. In former days a curtain, hanging from this bar, separated the schools. "Every one who is acquainted with Westminster School knows that there is a curtain which used to be drawn across the room to separate the upper school from the lower. A youth (Wake, father of Archbishop Wake) happened, by some mischance, to tear the above-mentioned curtain. The severity of the master (Dr. Busby) was too well known for the criminal to expect any pardon for such a fault; so that the boy, who was of a meek temper, was terrified to death at the thoughts of his appearance, when his friend who sat next to him bade him be of good cheer, for that he would take the fault on himself. He kept his word accordingly. As soon as they were grown up to be men the civil war broke out, in which our two friends took the opposite sides; one of them followed the Parliament, the other the royal party. As their tempers were different, the youth who had torn the curtain endeavored to raise himself on the civil list, and the other, who had borne the blame of it, on the military. The first succeeded so well that he was in a short time made a Judge under the Protector. The other was engaged in the unhappy enterprise of Penruddock and Groves in the West. Every one knows that the royal party was routed, and all the heads of them, among whom was the curtain champion, imprisoned at Exeter. It happened to be his friend's lot at that time to go the Western Circuit. The trial of the rebels, as they were then called, was very short, and nothing now remained but to pass sentence on them; when the Judge hearing the name

by settling him at a dame's in Dean's Yard.¹ The following are a few items in the account which he afterwards rendered in to Lady Stormont, and they give a more lively notion of the customs and manners of the time than could be gathered from whole pages of dull narrative, explanation, and dissertation :

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	<i>Lib. sh. d.</i>	<i>Items of disbursements for him.</i>
"1718. May 8. for y ^e carriage Mr. William's Box and bringing it home	09 .	
for his horse before he was sold	08 7	
To Dr. friend for entrance	1 01	
for a Trunk to him for his cloaths	13 0	
To his Landlady where he Boards, for Entry money	5 05 0	
— 25. for a sword to him	1 01 0	
for a belt	2 .	
for pocket money to him	3 .	
June 5. for pocket money	1 .	
for two wigs as per receipt	4 4 .	
— 18. for a double letter and pocket money to him	2 .	
Aug. 16. To Mr. William who went to the Countrey	6 .	
Dec. 17. Three guineas to the masters and a double letter	3 4 .	
1719. Jany. 4. for pocket money 5 shil: and the ij to Dr. Friend 3 guineas	3 8 .	
— 21. To Mr. W ^m . to Treat with before the Elections began	1 1 0	
Pay'd the Taylor as p ^r bill	9 9 .	
Pay'd Mrs. Tollet for $\frac{3}{4}$ years Board and for things laid out for him as p ^r bill	20 10 4''	

of his old friend, and observing his face more attentively, asked him if he was not formerly a Westminster scholar? By the answer, he was soon convinced that it was his former generous friend; and without saying anything more at that time, made the best of his way to London, where, employing all his power and interest with the Protector, he saved his friend from the fate of his unhappy associates" (*Spectator*, No. 313).—*Hare's Walks in London*.

1. From the Deanery a low archway leads into Dean's Yard, once called "The Elms," from its grove of trees. The eastern side was formerly occupied by the houses of the prior, sub-prior, and other officers of the convent, which still in part remain as houses of the canons. In the green space in the centre of the yard an exhibition of "the results of window-gardening" takes place every summer, exceedingly popular with the poorer inhabitants of Westminster, and often productive of

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William
Murray at
Westmin-
ster.

William Murray was a good boy, and stuck very steadily to his books. His strange dialect at first excited a little mirth among his companions, and they tried to torment him by jokes against his country; but he *showed his blood*, and they were speedily soothed by his agreeable manners, and awed by the solidity of his acquirements.

A.D. 1719.

At the end of a year (as his brother James, Earl of Dunbar, had foretold), he was elected a King's scholar.¹ Beyond his own merits there must have been some powerful interest required to procure this step, for Westminster School was then crowded, and the foundation was much coveted. I suspect that Bishop Atterbury had said a good word for the scion of a noble Jacobite family,—but of this there is no positive evidence.

Soon after, *Mr. Wemyss*, the apothecary, wrote the following letter, addressed—

“To

The Right Honble
The Viscountes of Stormont
at her house near Dumfries
By Carlisle Bag.

May 21.
Letter
from the
kind apoth-
ecary to
his mother
respecting
him.

“Madam,—I humbly beg pardon for my long silence; had there been anything of moment to impart to your La^p I shou'd not have fail'd to have written. Y^r La^p no doubt has heard that y^r son Mr. William has not only had merit but good luck to be chosen a queen's schollar, ffor I can tell y^r La^p that there is favour oftner that prevails against merit, even in this case as we'll as in other affairs of the world. Tho' give him his due there can't be a finer youth or one who minds his busines more closely. Y^r La^p sees that he spends a good deall of money. But he won't spend near so much next year.

“I got 40 guineas, so y^r La^p will see that I have laid out twelve pounds two shillings and 7*d.* more than I rec^d. I beg y^r La^p wou'd cause pay it in to Mrs. Janet Cunningham, at her much innocent pleasure through the rest of the year.—*Hare's Walks in London.*

1. May 21, 1719. (Printed list of King's scholars.)

mother's house, Cannongate Cross, Edinburgh—the mother is my aunt, her name Wemyss—for it will be cal'd for pretty soon.

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XXX.

I think to remitt some moey next week to Scotland; so if y^r L^{ap} pleases I shall lay out what moey you think fit in paying the other bills, w^{ch} will save you the exchang. My cusine will give you a receipt of the moey when it is pay'd her at Ed^r, w^{ch} shall be sufficient.¹ Y^r L^{ap} friends abroad are weill.² Pardon the trouble of my long l^{re}. I had no mind to send the bills in this letter because of its bulk. But I shall next week in a fränk.

"I am, Madam,

"Y^r L^{ps} most obedient humble servant,

"J. WEMYSS.

"London, May 21, 1719."

During the next four years of Mr. William's career ^{A.D. 1719} at Westminster School the following is the only anecdote of him handed down to us: ^{-1723.}

"Lady Kinnoul, in one of the vacations, invited him to her home, where, observing him with a pen in his hand, and seemingly thoughtful, she asked him 'if he was writing his theme, ^{Anecdote of him while at Westminster.}

I. There is an item in Mr. Barclay's accounts showing that the balance had been paid by him:

"1719. Oct. 17. *It.* Paid to Mrs. Janet Cunningham 22 lib. 5s. 9d. ster., on account of Mr. Wm. Murray, my Lord's son, on Mr. Wemyss letter to Mrs. Janet, and Mrs. Janet's receipt and my Lord's verball order at Scone to pay it. Inde . . . 267 09 00"

Money for Mr. Wm.'s use appears to have been remitted by Mr. Barclay to Mr. Wemyss:

"1720. Jany. 28. *It.* To Peter Crawford, factor, for a bill of £25 ster., drawn by him payable to the Compter on George Middleton Goldsmith in London, and indorsed by the Compter at my Lord's order to James Weems, Apothecarie in London, for behoof of Mr. William Murray, my Lord's son—the money and exchange to Peter Crawford being £25 10s. Inde . . . £306 00 00"

The bill had duly reached its destination, as appears from the following acknowledgment:

"Sir,—This comes to acquaint you that I have received the bill of 25 lib. sent by my Lord Stormont's order for the use of his son Mr. William, who is very weill. From

Sir

"Y^r humble Serv^t.

"June 26, 1720."

"Jo. WEMYSS.

2. This is probably a dark allusion to the court of the Pretender.

CHAP. and what in plain English the theme was?' The schoolboy's
XXX. smart answer rather surprised her ladyship—'What is that to you?' She replied, 'How can you be so rude? I asked you very civilly a plain question, and did not expect from a school-boy such a pert answer.' The reply was, 'Indeed, my lady, I can only answer once more, *What is that to you?*' In reality the theme was *QUID AD TE PERTINET.*"¹

I find general statements of his diligence and rapid progress in his studies :

Statements of his diligence and progress. "Fortunately," says a respectable biographer, "the school had never been in a more flourishing condition than at the period when he entered it. The number of the boys amounted to five hundred; and, besides the advantage of having for their daily instructors two such eminent scholars as Doctors Friend and Nicholl, they were examined at elections by Bishop Atterbury, who attended in his capacity of Dean of Westminster, Bishop Smalridge² as Dean of Christchurch, and Bentley³ as Master of Trinity College, Cambridge. The learned rivalry of such men could hardly fail to excite a corresponding emulation among the young scholars who were in the habit of witnessing it; and in the constant competition of talent to which this excitement must have given an additional stimulus, none shone more conspicuous than Murray. It is particularly recorded of him that his superiority was more manifest in the declamations than in any of the other exercises prescribed by the regulations of the school,—a fact not to be overlooked in the history of one who afterwards, as an orator, equalled if not excelled such competitors as it falls to the lot of few nations or ages to possess. His proficiency in classical attainments was almost equally great."⁴

"During the time of his being at school," says another who was actually his chum, "he gave early proof of his uncommon

1. ["That which belongs to you."] Holliday, p. 2.

2. George Smalridge, a learned English prelate, born at Lichfield in 1663. He became Bishop of Bristol in 1714. He published a volume of Sermons (1717). Died in 1719.—*Thomas' Biog. Dict.*

3. Richard Bentley, a celebrated divine and critic, born in 1661, died 1742. Dr. Bentley is advantageously known as a critic by his editions of Horace, Terence, and Phædrus, his unrivalled epistle to Mill, and his splendid dissertation on the Epistles of Phalaris. These last established his reputation throughout Europe as a critic of the very highest order of excellence.—*Beeton's Biog. Dict.*

4. Welsby, *Lives of Eminent Judges*, p. 370.

abilities, not so much in his *poetry* as in his other *exercises*, and particularly in his *declamations*, which were sure tokens and prognostics of that eloquence which grew up to such maturity and perfection at the bar and in both houses of parliament."¹

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Certain it is that, at the election in May, 1723, after a rigorous examination, it was found that William Murray was still "DUX," for he stood the first on the list of the King's scholars who were to be sent on the foundation to Christchurch. The following is an exact copy of his admission there:

He is
elected a
scholar of
Christ-
church
and goes to
Oxford.
May, 1723.

"Trin. Term. 1723, June 18.

Æd. Xti. Gul. Murray 18.

David f. Civ. Bath.

C. Som. V. Com. fil.

T. Wenman, C. A."

It will be observed that the place of his nativity is described as *Bath* instead of Perth. "Sir William Blackstone is said to have mentioned this curious circumstance to the Lord Chief Justice of the King's Bench while he had the honor to sit with him in that court; when Lord Mansfield answered 'that possibly the broad pronunciation of the person who gave in the description was the origin of the mistake.'"² This person was no other than himself, and he most likely misled the registrar by aiming at an English pronunciation, and calling the place *Parth*,—being still under the delusion, which holds some Scotsmen all their lives, that what is not Scotch in pronunciation and in idiom must necessarily be English.³

At this period of his life it was intended that he should take orders in the English Church; and his

The inten-
tion that
he should
take
orders.

1. Bishop Newton, p. 21.

2. Holliday, p. 2.

3. In this instance he might easily have been misled by analogy, which can so little be trusted in English pronunciation, as *c* before *r* is often pronounced like an *a*: Berkshire, Barkshire; Clerk, Clurk; Sergeant, Sar-geant. *P* and *B* are easily misunderstood for each other; and the *r* would be hardly discernible between *a* and *th*,—so that we have PERTH converted into BATH.

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His desti-
nation
changed
from the
Church to
the Bar.

A.D. 1723,
1724.
Assistance
afforded
him by the
first Lord
Foley.

family, if they did not hope that he would rise to be Archbishop of Canterbury, reckoned with confidence upon his being comfortably placed in a good college living. This last, probably, would have been his fate, and he would have been noticed after his death only in the parish register or in a pedigree of the Stormont-Murrays, had it not been for the accidental interference of an English nobleman wholly unconnected with him by blood or affinity. When he first left home, the notion of his being called to the bar in England had been talked of, but had been abandoned upon ascertaining that the expenses of a legal education were far greater in England than in Scotland, and would much exceed what the noble Viscount his father could afford. The young man himself acknowledged the necessity imposed upon him of taking orders; but when at Westminster School, having occasionally visited the great hall and heard the pleadings of Yorke and Talbot, he felt (as he described it) "a *calling* for the profession of the law," and he regretted that he could not try the effect of his eloquence at the bar rather than in the pulpit, notwithstanding the advantage which, as an ecclesiastical orator, he would enjoy of being freed from all apprehension of immediate refutation or reply. About the time of his removal to Oxford, he had casually mentioned his disappointment to a schoolfellow, a son of the first Lord Foley. This peer, who had amassed enormous riches from the invention of manufacturing iron by means of coal instead of wood, possessed a liberal and enlightened mind, and, having seen William Murray at his country house during the holidays, had discovered his genius, and had taken a fancy for him. Hearing that, on account of the narrow circumstances of his family, he was going, rather reluctantly, to prepare himself for ordination, instead of following the bent of his genius to

study the law, he, in the most generous and delicate manner, encouraged him to enter a career for which he was so well qualified, and undertook to assist him with the requisite supplies till the certain success which awaited him should enable him to repay the advance with interest. The offer so handsomely made was frankly accepted, and it had the auspicious result of establishing a real friendship between the parties notwithstanding inequality of years.

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With the consent of his family, the arrangement was made that Murray should be entered of an Inn of Court while he remained an undergraduate at Oxford; and, on the 23d day of April, 1724, he became a member of the Honorable Society of Lincoln's Inn, although he did not begin to keep his terms there till he had taken his bachelor's degree.¹

While at
Oxford he
is entered
of Lin-
coln's Inn,
April 23,
1724.

He resided at Oxford near four years, and made all his studies subservient to the profession which of his own liking he had adopted,—his energy being doubled from his considering the responsibility he had incurred, by deviating from the beaten track to obscure competence which lay open before him.

His studies
at Oxford,
A.D. 1725
—1727.

1. "Hon^{ble} Will^m Murray filius p^r. hon^{ble} Vicecomitis Stormont admissus est in Societatem hujus Hospicii vicesimo tertio die Aprilis anno regni Dⁿⁱ n^{ri} Georgii Dei gra Magnæ Britannie Fra & Hib^{niæ} Regis, &c. decimo annoq. Dⁿⁱ 1724. Et solvit ad usum Hospicii p^r. d. £3 3s. 4d.

"Manu captor Will. Hamilton.
"Admissus. John Washer."

Half the dues for which he was liable before he began to reside and keep his terms was afterwards remitted to him :

"At a Council held the 12th day of November, 1728.

"Upon the petition of the Hon^{ble} William Murray, Esq^r., a fellow of this Society, praying leave to compound for his absent Comons, it is Ordered that he be at liberty to compound for the same on paym^t of half w^t is due to the Treasurer of this Society before the next Council ; but if the said Mr. Murray shall within two years from this time be called to the Barr, sell his Chamber, or leave this Society, then it is Ordered that in either of the said cases he shall pay the rem^t of w^t is due for his Absent Comons."—*Books of Lincoln's Inn.*

CHAP.
XXX.

He escapes
"Port and
Prejudice."

We have not any minute account of the disposition of his hours during his residence at Oxford, but we know that he escaped pretty well the two great perils to which he was exposed, "*Port and Prejudice*." While Henley and other contemporaries were fostering the gout, and insuring premature old age, he preserved his constitution unimpaired. There is reason to think that he still inwardly cherished the high-Tory, or rather Jacobitical, principles which he had imbibed under the paternal roof; but he prudently concealed them, except on very rare occasions when he was heated by wine. Strange to say, in the atmosphere of bigotry which he breathed, although himself sincerely attached to the episcopalian form of church government, he entertained and professed liberal sentiments on religion, and strenuously advocated the cause of toleration against the universal voice of his companions, who, while they would have hesitated about *burning* Dissenters, were eager rigidly to enforce against them all the statutes by which they were deprived of civil privileges.

His opinion of
Aristotle.

Regular in chapel and at lecture, he did not neglect the peculiar studies of the place; and, without joining in the superstitious worship of Aristotle, he had the discernment to discover and the candor to acknowledge this philosopher to be the greatest master who had yet appeared, not only of the art of reasoning but of politics and literary criticism. Such discipline he submitted to in deference to authority: when he gratified the passion of his own bosom he devoted himself to ORATORY, by which his grand objects were to be accomplished. Those who look upon him with admiration as the antagonist of Chatham, and who would rival his fame, should be undeceived if they suppose that oratorical skill is merely the gift of nature, and should know by what laborious efforts it is acquired.

He devotes
himself to
the art of
oratory.

He read systematically all that had been written upon the subject, and he made himself familiar with all the ancient orators. Aspiring to be a lawyer and a statesman, Cicero was naturally his chief favorite; and he used to declare that there was not a single oration extant of this illustrious ornament of the forum and the senate-house which he had not, while at Oxford, translated into English, and, after an interval, according to the best of his ability, retranslated into Latin.

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XXX.

Cicero his
chief
favorite.

He likewise diligently practised original composition, both in Latin and English, knowing that there is no other method by which correctness and condensation in extempore speaking can be acquired. From the fatal conflagration which destroyed his papers in 1780 there was preserved a fragment of a Latin Essay, written by him on the *chef d'œuvre* of Demosthenes, *Περὶ Στέφανου*. A few extracts from it may show his acquaintance with the dialect which he used, and his tasteful appreciation of the divine composition which he criticised. After stating the occasion of the oration, and analyzing its different divisions, he exclaims—

His Latin
Essay crit-
icising
Demos-
thenes.

“Quâ solemnitate exordii animos auditorum incitat! Deosque deasque omnes benevolentiae suae in civitatem testes adhibet! Quam sibi modestâ meritorum in cives suos commemoratione ad se audiendum munivit viam! Dum nihil aliud videtur elaborare quam ut cum æquo animo iudices audiant, efficit ut prosequantur benevolo. Mentibus omnium ad lenitatem misericordiamque erga se revocatis, de legibus pauca disceptat. Quâ subtilitate Æschinis interpretationem oppugnat et evertit, suam defendit et probat: Quam acuta et enucleata est hæc tota disceptatio, quam pressa! Festinat enim ad res suas pro Republicâ gestas (quod validissimum causæ firmamentum videbatur) orationem convertere et in uberiori administrationis suae campo spatari.”¹

1. “With what solemnity his exordium seizes the hearts of his audience! He adduces all the gods and goddesses as witnesses of his love for his country. With what a modest reference to his own services does he prepare the way for a favorable hearing! While he professes only to

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XXX.
His Latin
essay crit-
icising
Demos-
thenes,
continued.

Thus he praises the transition to invective, when the orator, like the dew descending in the evening on a parched field, had soothed the indignation excited by the peroration of his antagonist:

"Quis flexanimam Demosthenis potentiam digne explicaverit, quæ summissio placidoque principio in animos omnium, velut in accensos agros taciturno roris imbre leniter fluentes incendium quod reliquerit Æschines extinguit, populique furorem placat. Mox vehemens et acer vi quâdem incredibili auditores extra se, contra Æschinem calumniatorem odio, mercenarium Philippi contemptu proditorem patriæ irâ rapit."¹

In conclusion he draws a parallel between the respective chiefs of Greek and Roman eloquence; giving on this occasion the preference to the former, although the latter was known really most to have occupied his time, and to have engaged his affections:

"Demostheni, qui sub historici personâ oratorem celat, qui felici eâ audaciâ quam veritas sola parit, beneficiorum cives, benevolentiae suæ Deos testes adhibet, credimus et favemus. Cicero, placatis judicum animis quantum ipsi patiuntur accepit, tanta tamen ejus facundia, ut quidvis impetrare posse videatur. Non *petit* Demosthenes sed *rapit*, sed impetu quodam penè divino, sententias de eorum manibus *extorquet*. Dulci Ciceronis arte veluti Sirenium cantu, delectati judices cum illo malunt errare, quam cum aliis rectè sentire. Demostheni tanta aucto-

implere that they will listen to him with the impartiality of judges, he renders them all eager for his acquittal. Their minds being thus softened towards him, he proceeds briefly to consider the legal and constitutional principles by which the cause was to be decided. With what subtlety does he combat and destroy the positions of Æschines—while he defends and establishes his own! How acute, how terse, and how condensed is this portion of his discourse! For he hurries on to his own measures and to his administration of public affairs, upon which judgment was to be pronounced."

1. "Who shall ever be able to explain the mastery of Demosthenes over the human affections? Beginning in a mild and subdued tone, like dew gently descending on the parched fields, he extinguishes the flame which Æschines had raised, and soothes the popular fury. But soon after, having become vehement and sarcastic,—with miraculous force he controls at will the feelings of his hearers, and holds up Æschines to their indignation, hatred, and contempt, as a calumniator, as the mercenary tool of Philip, and as the betrayer of his native land."

ritas inest, ut *pudent* dissentire, et cum fulmine eloquentiæ *trans-* CHAP.
versè feruntur auditores, non oratoris arte abripi, sed *naturam* XXX.
 sequi, sed rectæ rationi se parere credunt. Cum orationes suas His Latin
 contra Clodium aut Catilinam figuris augeat, elocutione Tullius Essay crit-
 exornat, circumstantis populi clamoribus etiam admiratione icising
 excipitur. Cum Demosthenes contra Æschinem iis affectibus, Demos-
 qui ab *ipsâ naturâ* oriuntur, suam animat iracundiam, dicentis thenes,
 obliviscuntur Athenienses, et (ut historiæ proditum est) *eodem* continued.
 furore omnes inflammati *mercenarium* Æschinem appellant.”¹

This criticism shows that Murray, long before he ever spoke in public, had reflected much and deeply on the principles of the art in which, with a view to the distant future, he was earnestly endeavoring to improve himself, and that he had been early accus-

1. “When Demosthenes, concealing the skilful advocate under the disguise of a plain narrator of facts with that felicitous boldness which is supposed to spring from truth alone, appeals to his fellow citizens as witnesses of the benefits he has conferred upon them, and to the Gods themselves to prove the ardent patriotism that had ever animated his bosom, we implicitly believe all he says, and, warmly taking his side, we are impatient to see him vindicated and rewarded. Cicero having convinced the understandings of the judges before whom he pleads, they, after deliberation, pronounce in his favor the sentence which they think just; the eloquence displayed by him, however, being so brilliant, that we conceive there is nothing which would not be conceded to it. Demosthenes does not *ask*—he *seizes*—by an energy almost divine, he wrests from the hands of the judges the sentence which he desires. Being captivated by the witching art of Cicero as by the song of the Sirens, they are better pleased to go astray with him than to decide righteously with others. Such authority does Demosthenes carry along with him, that his hearers are ashamed to differ from him, and, when struck by the lightning of his eloquence, they do not seem to be carried away by the art of the orator, but believe themselves to obey a natural impulse, and to yield to the dictates of right reason. When Cicero ornaments with the choicest figures of rhetoric and beauties of language his declamation against Clodius or Cataline, he is received with the admiration and plaudits of surrounding multitudes. When Demosthenes kindled rage against his accuser by giving vent to feelings which seem to rise spontaneously in the human heart, the Athenian people forgot the crimes imputed to the accused, and (as history relates), all inflamed with the same fury, hooted at Æschines as a wretch who had been suborned to bring a false charge against an innocent man.”

N.B. I am afraid that, from long disuse, my translation is very imperfect, although I once was accustomed to the exercise from which Murray is supposed to have derived such advantage.

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XXX.

tomed to calculate by what means a particular effect is most likely to be produced on the passions or the understandings of a popular assembly.

A.D. 1727.
He gains
the Latin
prize poem
on the
Death of
George I.

He continued, but with far less success, to cultivate the Muses in the mechanical fashion which he had learned at Westminster; and, on the death of George I., he entered into a competition with all the most accomplished versifiers then at Oxford to celebrate the praises of that poetry-hating monarch.¹

The art of grinding Latin verses must then have been extremely low at Oxford, for Murray's poem gained the first prize. I do not pretend to be by any means a nice judge of such compositions, but it seems to me a very wretched production, and I could point out much better imitations in the *MUSEÆ EDINENSES*. Thus he begins with a description of the terrible blow by which the sword of fate had deprived the United Kingdom of *GEORGE*, the conqueror of the Rhine and of the Danube:

Its descrip-
tion of the
terrible
blow of the
sword of
fate,

"Quo percussisti Britonas conjunctaque regna
Ictu, Fati ensis ! trepidant ipsa atria regum
Ingentemque stupet morrens Europa ruinam.
Georgius occubuit Rheni pacator et Istri :
Et dubitamus adhuc animam accumulare supremis
Egregiam donis ? quondam decus omne Britannis
Spargite flore pio cineres, oleæ *Minerva*
Inventrix, et Phœbe pater, cui laurea cura !
Hic Juvenis laurum sovit, longævus olivam."

1. Trying to speak English, when refusing to allow a poem to be dedicated to him, he exclaimed, "I hate all Boets and Bainters!"

2. "Thou sword of fate, with what a fearful blow
Hast thou made England shake from top to toe.
Lo ! Windsor's royal halls are fill'd with dread ;
And Europe, stunn'd, laments the mighty dead.
See George, who both the Danube and the Rhine
Subdued and civilized, at last resign
His throne and breath. And shall the grateful Muse
Her tribute to such wondrous worth refuse ?
No ; let Minerva strew with Phœbus here
Her olive with his laurel on His bier,
Whose warlike youth to laurel'd honor led,
Whilst peaceful olive crown'd his aged head."

After expiating at great length upon the achievements and virtues of the deceased, lest the nation should be thrown into absolute despair by such a heavy privation he concludes with a panegyric on the "other hope of Britain," under whose enlightened sway they were about to live, and who was not less tenderly beloved by the gownsmen of Oxford than by his spouse, Queen Caroline :

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*Tu tamen interea, quondam spes aliera gentis
Nunc decus et columen, populo plaudente, Britanno
Succedis Solio ; ordinibus discordia cessit
In te diversis, patrie vox una salutat.
Hos inter plausus procerum plebisque benigno
Accipias Rex ore, vovet tibi terga togata,
Que, studiosa cohors operum ! pars parva tuorum
Non ingrata tamen ; quoniam nec amantior ipsa
Est Carolina tui, licet illi pronuba Juno
Et Venus aterna cinxerunt pectora flamma."*¹

Its panegyric on the "other hope of Britain."

It is curious to think that the elder Pitt, between whom and the two succeeding Georges there was such mortal enmity, on this occasion tried to gain the prize for extolling George I.,—certainly in no degree superior to them,—and is supposed, by reason of his dis-
appointment, to have contracted a dislike of the fortunate candidate, which he cherished to his dying day. No one could then have foreseen the more brilliant

Origin of the rivalry between Murray and the elder Pitt.

1. "But cease, my Muse, these fond lamenting strains ;
Our rising hope, and now our glory, reigns.
Hark to that shout ! the people's joyful tone ;
A second George ascends the British throne !
Lo ! discord ceases, all at once agree,
United England looks, Great Sire, to thee.
Amidst these sounds, whilst all at once rejoice,
Thy band of Gownsmen raise their loyal voice,
Though small indeed their offerings seem to prove,
Deign to behold their merits in their love—
Not Carolina's more,—though Juno's crown
And Venus' form have mark'd her for thine own."

The poem is signed—

"GUL. MURRAY,

Honoratiss. Vicecom. de Stormont, Fil.

.Edis Christi alumnus."

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strife in which the rivals were afterwards engaged as leaders of the opposite factions in the state.¹

Murray at
Lincoln's
Inn.
A.D. 1727
—1730.

Murray having taken his degree of B.A., without any opportunity of testing his proficiency by senate-house honors, was transferred to London. He obtained chambers in Lincoln's Inn,² and began in good earnest to acquire a knowledge of his profession. While at Oxford he had attended lectures on the Pandects of Justinian, which gave him a permanent taste for that noble system of jurisprudence.

His private
and spon-
taneous ex-
ertion.

Unfortunately we have only an imperfect account of the course of study which produced the most accomplished Judge who ever presided in the Court of King's Bench. We know that he owed everything to private and spontaneous exertion. The false maxim on which legal education now rests in England, "every man to learn as he likes,"³ receives some countenance from his example. When there is a combination of enthusiasm and steady perseverance, the want of means of instruction provided by the state is little felt, and tests of proficiency by public examination may be dispensed with; but I conceive that, in regard to the great mass of students entering a learned profession, it is necessary, by institution and discipline, to guide

1. The following is Mr. Macaulay's criticism on the unsuccessful lines of Pitt: "They prove that the young student had but a very limited knowledge even of the mechanical part of his art. All true Etonians will bear with concern that their illustrious schoolfellow is guilty of making the first syllable in *labenti* short. The matter of the poem is as worthless as that of any college exercise that was ever written before or since. There is of course much about Mars, Themis, Neptune, and Coeytus. The Muses are earnestly entreated to weep over the urn of CÆSAR; for CÆSAR, says the poet, loved the Muses; CÆSAR, who could not read a line of Pope, and who loved nothing but punch and fat women."—*Essays*, ii. 150.

2. Till he had been several years at the bar he lived in a very small set, three stories high, No. 1, "Old Square," then called *Gatehouse Court*. They were pointed out to me when I commenced my career in a similar set, No. 2, three stories high, next door; and there are several entries in the books of the Society connecting him with them.

3. Or "laissez rien faire."

inexperience, to stimulate indolence, to correct the propensity to dissipation, and to have some assurance that those intrusted with defending life and property are decently well qualified for the duties which they may be called upon to discharge.

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During the three years that Mr. Murray passed as a student in Lincoln's Inn, all that the benchers required of him was to dine in the hall five days each term, and once a term to read the first sentence of a paper prepared for him by the steward, called "an exercise," a remnant of the ancient custom of scholastic disputation. But, by an admirable disposition of his time, while he mixed in society and still attended to elegant literature, he was sedulously and skilfully preparing himself to be a great advocate and the greatest of judges.

What the
benchers
required of
him.

First, he thoroughly grounded himself in ancient and modern history by a perusal of the most eminent original historians. He then applied diligently to ethics, which he mastered, and from his own experience he always strongly recommended the philosophical works of Cicero. But he never showed any taste for metaphysics, which were now engrossing the attention of his countrymen. The foundation of jurisprudence he maintained to be the Roman civil law. Thence he proceeded to international law, doing full justice to the learning and genius of Grotius, its codifier and almost its founder. Next he entered on the feudal law, without which our law of real property must be very imperfectly understood. Here he showed his discernment by taking for his guide and his favorite his countryman CRAIG,¹ whose treatise DE

How he
prepared
himself to
be a great
advocate
and the
greatest of
judges.

1. Thomas Craig (1538-1608), of Riccarton, an eminent Scottish lawyer and antiquary. After pursuing his studies in Paris, he passed advocate in Edinburgh in 1563 and became a judge in 1564. He wrote several admired Latin poems, one of which is on the birth of James VI. In 1603 he completed his celebrated work on "Feudal Law" ("Jus Feudale").

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XXX.

His injustice to the merits of Coke.

FEUDIS he justly thought was much to be preferred to any juridical work which England had then produced. Next came the English municipal law, and this he was obliged to search for in very crabbed and uncouth compositions, which often filled him with disgust and sometimes with despair. He was pleased with Bracton, and could not deny the terseness and perspicuity of Littleton; but he never could be made to fall down and worship Lord Coke, whom we are taught to regard as the god of our idolatry. Nay, he was unjust to the merits of this quaint and immethodical though learned and accurate writer, and used constantly to be laughing at his etymologies,—as, that “parliament is derived from *parler le ment* ;” and his trying to give reasons for all that the law enacts, as his defence of the old sentence of mutilation in high treason “to show that the traitor ought to have had no ancestors, and should have no posterity.” Indeed, instead of being, like Sir William Blackstone, a legal *optimist*, he did not sufficiently appreciate the merits of the old common law; overlooking the love of public liberty displayed by many of its maxims, and its admirably contrived machinery for separating questions of law from questions of fact, and for bringing a suit to the real point on which it ought to be determined. But he submitted to the drudgery of toiling through tiresome text-books and rubbishy reports, and he became as well acquainted with “collateral warranties” and “recoveries with double voucher” as lawyers who, never travelling beyond their black-letter lore, venerated these processes as the perfection of human reason.

His attention to the law of Scotland and of France.

Expecting to be employed in appeals from Scotland, which, since the Union, were decided at the bar

which was not published until 1655, and which is regarded as an authority all over Europe.—*Thomas' Biog. Dict.*

of the House of Lords, he paid much attention to the law of that country, and he expressed satisfaction with the methodical arrangement and precise definitions of Mackenzie and Stair. But his true delight was to dip into the juridical writers of France, that he might see how the Roman and feudal laws had been blended in the different provinces of that kingdom; and, above all, to pore over the admirable commercial code recently promulgated there under the title of "ORDINANCE DE LA MARINE," which he hoped one day to introduce here by well-considered judicial decisions,—a bright vision which was afterwards realized.

CHAP.
XXX.

His delight
in poring
over the
"Ordi-
nance de la
Marine."

He never had the advantage of being initiated in the mysteries of legal warfare by any practitioner; the *pupilizing* system, now in such vigor, having been introduced in the following generation by the celebrated Tom Warren¹ and Mr. Justice Buller.² He attended

1. My great-great-grandfather in Law.

2. Lord Macclesfield and Lord Hardwicke had each sat in a law office before being called to the bar; but the former had been an attorney, and the latter was intended for one.—Francis Buller was of an ancient and renowned Cornish family, the members of which were famous in the senate, in the Church, and in many distinguished posts in the service of the state. Francis was born on March 17, 1746, and was entered at the Inner Temple on February 3, 1763. He became a pupil of Mr. (afterwards Judge) Ashhurst, and in 1765 felt competent to set up for himself. For seven years he was in full practice as a special pleader, and his reputation in that character was greatly enhanced by the publication in 1767 of a work (said to be founded on collections made by his uncle, Mr. Justice Bathurst) entitled "An Introduction to the Law relative to Trials at Nisi Prius," which was so much esteemed that it went through six editions before his death. He was called to the bar in Easter Term 1772, and immediately took a high rank among his colleagues. His assistance and advice were in perpetual requisition, and there was scarcely any case of importance in which he was not engaged. The Reports of Henry Cowper and the State Trials amply show, not only the extent of his practice, but the excellence of his advocacy. Lord Mansfield soon recognized his genius and promoted his advancement, which was furthered by his uncle, Lord Chancellor Bathurst. In 1777 he was made a King's Counsel and Second Judge on the Chester Circuit; and on May 6, 1778, he was appointed a Judge of the King's Bench, being then only thirty-two years of age. Lord Mansfield's expectations were fully realized by the effectual assistance he received during the ten years he remained Chief Justice, in

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He attends
a debating
society.

a debating society, where knotty questions of law were discussed; and such pains did he take in getting up his arguments, that the notes he then made were frequently of use to him when he was at the bar, and even after he had been elevated to the bench. But his principal resource for gaining experience was attending the courts at Westminster and listening to the judgments of Chief Justice Raymond. He continued to think that, in the absence of academical lectures and examinations, such an attendance is the best opportunity which candidates for the bar enjoy of gaining a liberal knowledge of their profession. For this reason, considering it for the public welfare as well as for their advantage individually that they should be properly instructed,—when presiding in the King's Bench he was in the constant habit of explaining the intricacies of the cases tried before him, and giving the reasons of his judgments, not only to satisfy the parties, but, as he expressed it, “for the sake of the students.”¹

the last two of which, when his health began to decline, he found a most efficient and active substitute in Mr. Justice Buller, who not only conducted for him the sittings at Nisi Prius, but in the absence of the Chief took the lead in Banco, though Judge Ashhurst was his senior. In those two years, in fact, he was little less than Chief Justice, and in the hope of inducing the minister to make him really so, it is understood that Lord Mansfield delayed his own resignation. Mr. Pitt, however, from political and other motives would not consent, but appointed Lord Kenyon as Lord Mansfield's successor, giving Mr. Justice Buller the very inadequate compensation of a baronetcy in January, 1790. Under Lord Kenyon he remained for six years, and in Easter, 1794, he removed into the Common Pleas, where he sat for six years more. Being then prostrated by physical infirmity, he arranged with the Lord Chancellor for the resignation of his seat; but on June 5, 1800, the very day after that arrangement, and before it could be effected, he died at his house in Bedford Square, at the age of fifty-four, and was buried in St. Andrew's, Holborn.—*Foss's Lives of the Judges*.

1. I began my legal studentship in the last days of Lord Kenyon. The court at Westminster was so constructed, that we could have no communication with him; but I have a lively recollection that at Guildhall, the students having a box close by him, he handed the record to us, and he would point out to us the important issues to be tried. I do not remember that he ever publicly alluded to our presence

The marvellous circumstance is, that, in the midst of these multifarious and severe studies, Mr. Murray was "drinking champagne with the wits."¹ I am almost afraid to record it, lest it should seduce some heedless youths into the false and deceitful notion that dissipation is compatible with success in our profession. But let them remember, that before he went to *Will's* or *Button's* he had been eight or ten hours busily employed in professional studies; and that when he associated with gay companions he never so indulged as to be prevented from rising to light his own fire next morning, or from sitting down to his books with a sound stomach and a clear head. Above all, before they expose themselves to temptation, let them wait till such *noctes canæque diem*² as were enjoyed by Murray are actually in their power.

The most intimate and familiar friend he had in the world was ALEXANDER POPE!!!³ To this prince of

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He "drinks
cham-
pagne with
the wits."

His inti-
macy with
Pope.

1. Boswell's Life of Johnson.

2. "Nights and dinners of the gods."

3. Alexander Pope, an English poet, born in London, May 22, 1688, died at Twickenham, Middlesex, May 30, 1744. His father was a Roman Catholic, who, having acquired a small fortune as a linen merchant, retired to Binfield in Windsor Forest. Alexander inherited a crooked body and a sickly constitution. Having taught himself to write by copying out of printed books, he learned a little Greek and Latin from a priest, and was then sent to school, first at Twyford, where he was flogged for lampooning his master, and afterward in London, where he studied little but Dryden, Spenser, Waller, Ogilby's translation of Homer, and Sandys's translation of Ovid. Dryden was his master in the art of poetry. The earliest of his pieces extant is an "Ode on Solitude," written when he was about twelve. About 1704 he was introduced by Sir William Trumbull to the veteran dramatist Wycherly, under whose auspices he made his first acquaintance with the coffee-house wits of London. In 1709 he established his position as the first poet of his time, by the publication of his "Pastorals," written five years before. He had already begun the "Essay on Criticism," which was published anonymously in 1711, and assailed by John Dennis with the most extravagant abuse, while Addison praised it in the "Spectator" (No. 253) as "a masterpiece in its kind." The first sketch of the "Rape of the Lock," a mere skeleton of what the poem afterward became, appeared in Lintot's collection of "Miscellaneous Poems and Translations" in 1712. The "Dunciad" was produced in 1728. The plan was borrowed from Dryden's "MacFlecknoe," and

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poets he had been introduced, while at Westminster School, by his countryman Lord Marchmont, and a warm and steady attachment sprang up between them. The young Scot was at first exceedingly flattered and delighted by the notice of a writer of such celebrity, whose PASTORALS he had got by heart when a child, but whom, till he was sent to England, he had never hoped to behold. Afterwards he had the good taste to relish the exquisite powers of conversation which the bard could display in the company of those he liked, and he was touched by experiencing constant kindness from one who was disposed to treat nobles and kings with disdain. Pope, on the other hand, intuitively discovered the genius of this juvenile worshipper, was struck by his extraordinary accomplishments, agreeable manners, ingenuous countenance, and (it is said), above all, by the *silvery tones of his voice*, which seemed then, and ever after, to have doubled the effect of all his other powers to win his way in the world.¹ In such favor was Murray, that when he had adopted the law as his profession, and he came to reside as a student at Lincoln's Inn, the autocrat of the literary world, anxious for his success, actually undertook to teach him oratory;—not the composition of orations, but the varying attitudes and intonation with which they should be delivered. Murray had frequent invitations to Twickenham; and Pope, coming to Lincoln's Inn, would spend hours in instructing him. One day the pupil was surprised by a gay Templar,

the hero at first was Theobald, who in a later edition was dethroned to make room for Colley Cibber. The sensation caused by the poem was immense. On the morning of publication, the "dunces" besieged the printer's shop in crowds to prevent its sale, and failing in that, held weekly clubs to concert hostilities.—*Appl. Encyc.*, vol. xiii. p. 707.

1. The fanciful may suppose that their harmony arose from *vocal unison*. Dr. Johnson, in his Life of Pope, says, "His voice, when he was young, was so pleasing, that he was called in fondness the *little nightingale*."

who could take the liberty of entering his rooms without the ceremonious introduction of a servant, in the act of practising the graces of a speaker at a glass, while Pope sat by in the character of preceptor. Bishop Warburton¹ accounts for the extraordinary marks of kindness which Murray thus experienced: "Mr. Pope had all the warmth of affection for this great lawyer, and indeed no man ever more deserved to have a poet for his friend; in the obtaining of which, as neither vanity, party, nor fear had a share, so he supported his title to it by all the offices of a generous and true friendship."²

Lord Mansfield's biographers represent him as now making the "grand tour," and, from the language they employ, it might be supposed that he spent several years in wandering over distant lands and sojourning at foreign courts.³ He did cross the English Channel, but, upon examining dates, it will be found that his "travels over the continent of Europe" shrink into a long-vacation trip to France and Italy, which most

CHAP.
XXX.

A.D. 1739.
His excursion to
France and
Italy.

1. William Warburton, a learned English prelate, born in 1698, who was brought up to the profession of an attorney, which he relinquished, and after going through a course of study, took orders without having received a university education. He afterwards received the degree of D.D. by mandamus from Cambridge. After acquiring a high literary reputation by his writings, he was in 1759 consecrated Bishop of Gloucester. His greatest work was the "Divine Legation of Moses," in which he defended revelation upon the grounds of religious deism by admitting, that though a future state made no part of the Jewish legislator's system, yet that the truth of the Mosaic scheme is capable of a moral demonstration. This work was, however, attacked with great violence, to which Warburton replied with haughtiness and asperity. About 1740 he became intimate with Pope, after he had written several letters in defence of that poet's "Essay on Man." When Pope died (1744) he left half of his library, and other valuable property, to Warburton. He died at Gloucester, in June, 1779.—*Beeton's Biog. Dict.*

2. Annotations on Pope's Imitation of the Sixth Epistle of the First Book of Horace.

3. Lord Brougham describes him as "enjoying all the advantages of a finished classical education; adding to this the enlargement of mind derived from foreign travel, undertaken at an age when attentive observation can be accompanied by reflection." (*Statesmen*, i. 100.)

CHAP.
XXX.

He is
called to
the bar,
Nov. 23.

practising lawyers have taken. On the 24th of June, 1730, after keeping Trinity Term at Lincoln's Inn, he was present in the schools at Oxford, and, with the usual forms, received the degree of M.A. On the 23d day of November following, he was called to the bar in Lincoln's Inn Hall; and he probably had returned some weeks previously, to make preparations for commencing his professional career.¹ I believe there is not extant any account of his adventures—but thus speculates one author, who would have us believe that, as Gibbon conceived the plan of his "Decline and Fall" on viewing the ruins of the Capitol, so Murray was first fired with the ambition of being a great lawyer and orator on beholding the scene where Cicero had triumphed:

"At Rome Mr. Murray was probably inspired and animated with the love of Ciceronian eloquence; at Rome he was prompted to make Cicero his great example and his theme. At Tusculum, and in his perambulations over classical ground, why might he not be emulous to lay the foundation of that noble superstructure of bright fame which he soon raised after he became a member of Lincoln's Inn?"²

I make no doubt that, ever industrious and eager for improvement, he turned his jaunt of two or three months to the best advantage, and that, having introductions to our ministers abroad and to the most eminent literary characters in the cities which he visited, he saw, and reflected, and profited more in this short interval than the ordinary "sons of earth," who waste years on the Continent, chiefly employed in criticising the performances of opera singers, or in

1. "At a Council held the 23d day of Nov. 1730.—Ordered that the Hon^{ble} W^m Murray, Esq^r, one of the fellows of this Society, being of full standing, and having observed the rules of this Society, and performed all his exercises, be called to the bar, first paying all his arrears and duties to this Society; and that he be published at the next Exercises in the Hall."

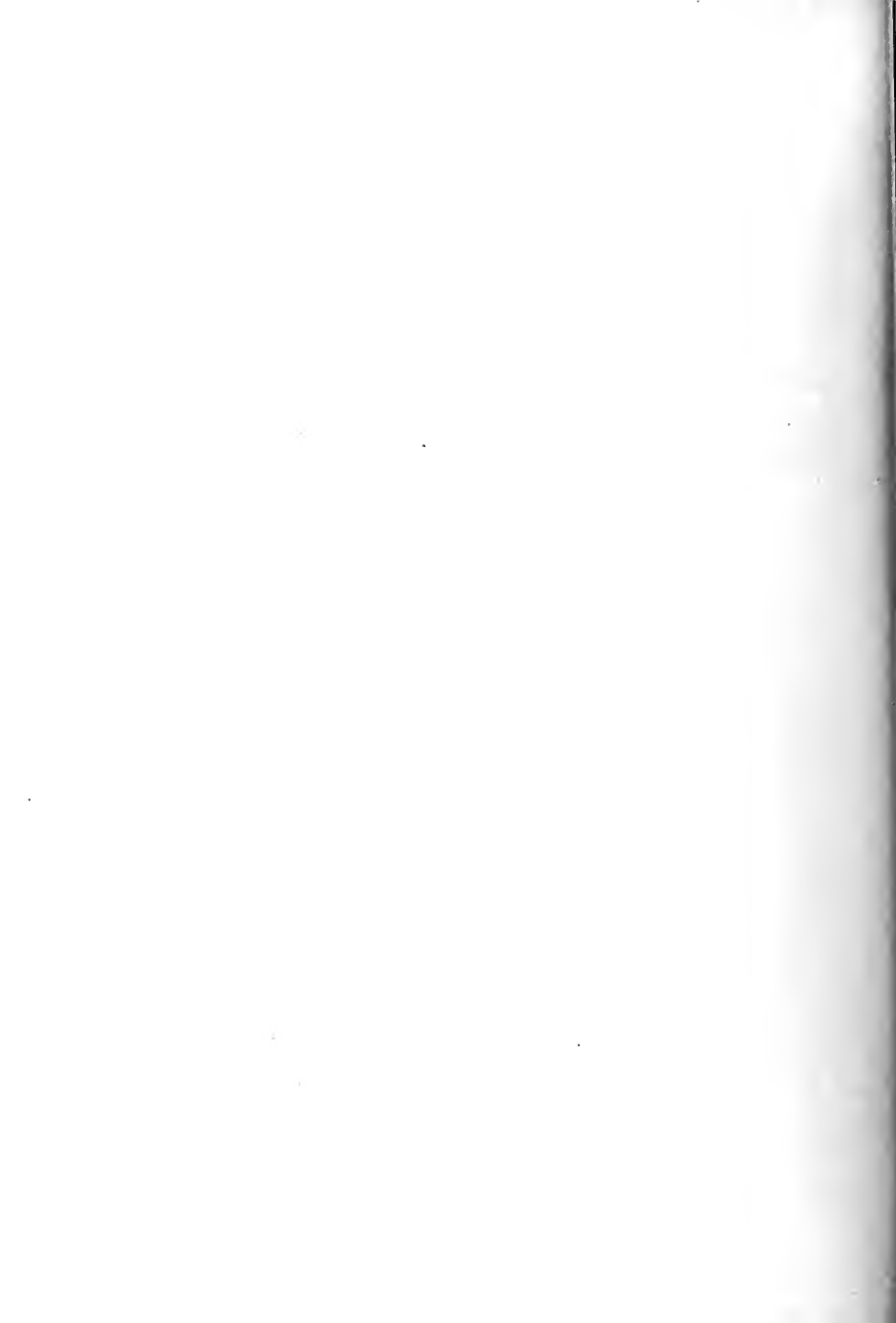
2. Holliday, pp. 9, 10.

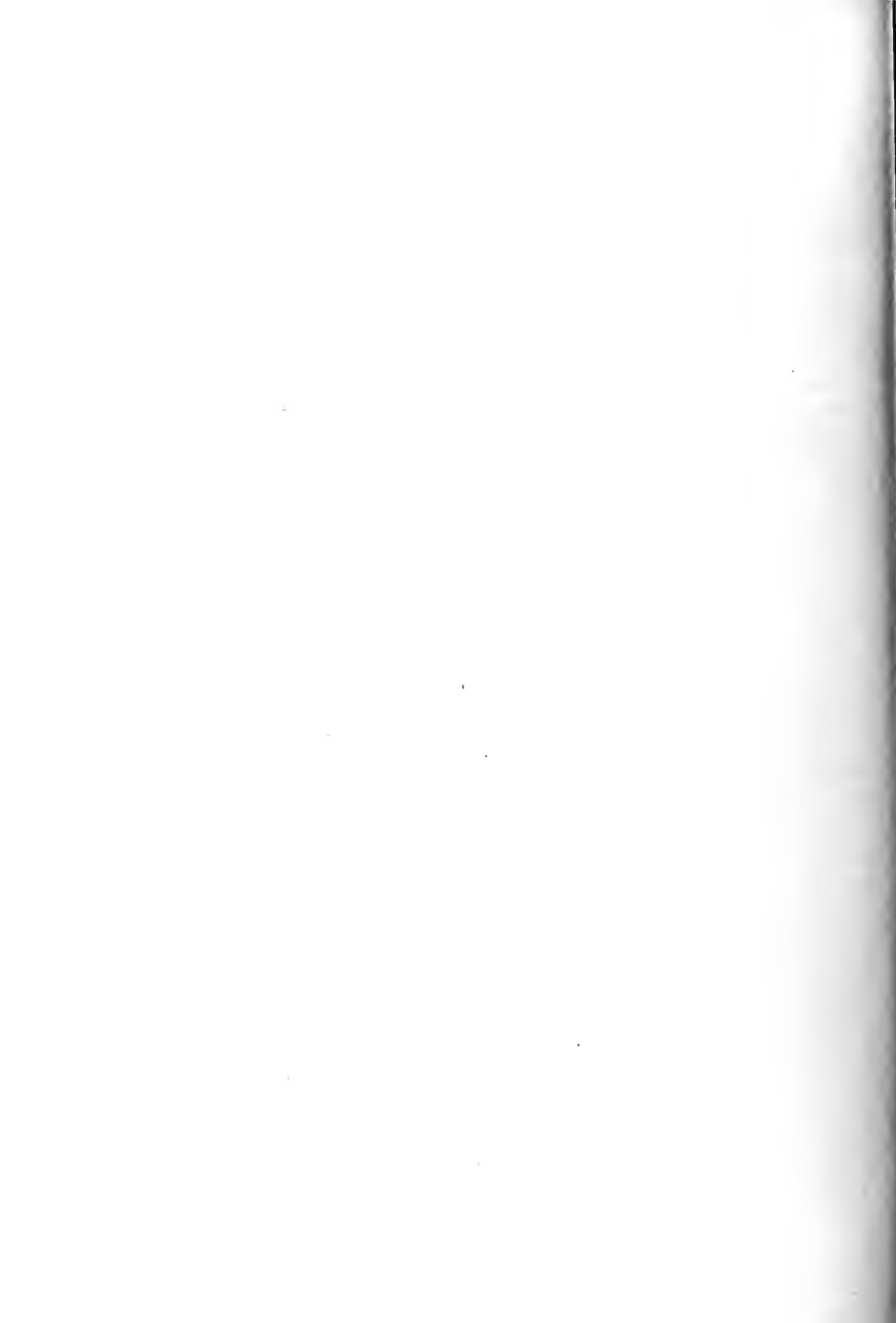
exposing themselves to ridicule for their determined adherence to English prejudices and absurdities.

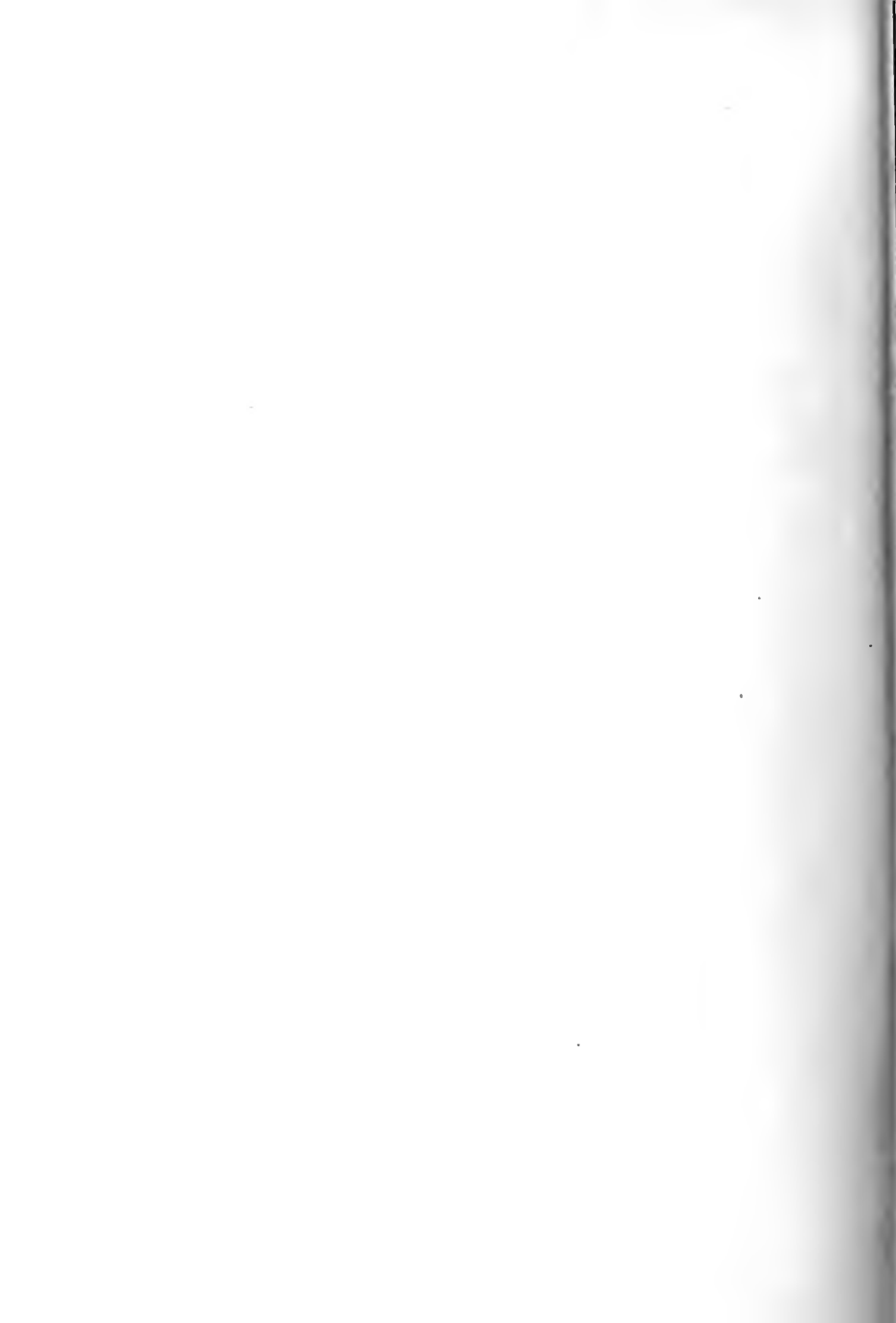
When he put on the long robe, it may be safely affirmed that there had not hitherto appeared at the English bar a young man so well qualified by his acquirements to follow the law as a *liberal* profession. Without having become a deep **black-letter** lawyer, he was scientifically familiar with our municipal jurisprudence, and capable of conquering any particular point in it which he might have occasion to encounter. He had made himself acquainted not only with international law, but with the codes of all the most civilized nations, ancient and modern; he was an elegant classical scholar; he was thoroughly imbued with the literature of his own country; he had profoundly studied our mixed constitution; he had a sincere desire to be of service to his country, and he was animated by a noble aspiration after honorable fame. A very different being this from the *dull plodder*, who, having gained a knowledge of forms and technical rules, looks only to make his bread by law as a trade—or the *empty adventurer*, who expects to secure wealth and high office by a flashy speech!

CHAP.
XXX.

November.
His accom-
plishments
as an ad-
vocate.









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